Supreme Court, U.S.
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In The

Supreme Court of the United States

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY; FRANKLIN E. WHITE, MTA Chief Executive Officer in his Individual and Official Capacities; JOSEPH NMI DREW, MTA Acting Chief Executive Officer in his Individual and Official Capacities,

Petitioners,

vs.

LABOR/COMMUNITY STRATEGY CENTER; BUS RIDERS UNION; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF GREATER LOS ANGELES COUNTY; KOREAN IMMIGRANT WORKERS ADVOCATES; MARIA GUARDADO; RICARDO ZELADA; NOEMI ZELADA; PEARL DANIELS; HENRY FREDERICK RAMEY, JR.; O. HOWARD WATTS; WILLIAM TUT HAYES; VICTOR DIBAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are the Los Angeles County Metropolitan Transportation Authority ("MTA") and the MTA's named executive officers. The MTA is California's agency statutorily charged with planning, constructing, financing and operating Los Angeles County's public transportation systems, *e.g.*, freeways, highways, buses, subways and trains. Cal. Pub. Util. Code §§ 130050.2, 130300, 130301. This case arises from proceedings initiated by respondents to enforce a consent decree ("Decree") following settlement of their civil rights action. No constitutional or statutory violation was ever conceded or adjudicated.

1. Did the Ninth Circuit disobey *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 95 S. Ct. 926, 43 L. Ed. 2d 148 (1975), and *United States v. Armour & Co.*, 402 U.S. 673, 91 S. Ct. 1752, 29 L. Ed. 2d 256 (1971), by construing the Decree solely as a judgment rather than as a contract for enforcement purposes thereby creating conflicts with the other Circuits?

2. Did the Ninth Circuit disobey this Court's limitations on federal courts' power to intrude into the discretionary authority committed to state agencies by ordering the MTA to buy hundreds of buses that the Decree did not require and that the MTA had insufficient funding to buy and to operate while simultaneously meeting its statutory obligations to users of its transportation systems other than bus riders?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Labor/Community Strategy Center, et al. v. Los Angeles County Metropolitan Transportation Authority, et al.*, 263 F.3d 1041 (9th Cir. 2001) (Appendix A hereto). The Order denying petitioners' Petition for Rehearing and for Rehearing en Banc is unreported. (Appendix B.) The district court's orders are unreported. (Appendix C.) The special master's "order" and his modification thereof is unreported. (Appendices D and E.) The Consent Decree is unreported. (Appendix F.)

JURISDICTION

The opinion of the Court of Appeals was filed on August 31, 2001. Petitioners timely filed their Petition for Rehearing and Rehearing en Banc, which was denied by Order filed October 16, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent federal and California statutes are set forth in Appendix G.

STATEMENT OF THE CASE

Introduction. The lower courts' misinterpretation of the Decree and the mandatory injunction based thereon adversely affects millions of people in Los Angeles

County who rely on the MTA's multiple public transportation systems every day. In reaching their erroneous conclusions, the lower courts have failed to follow this Court's decisions requiring consent decrees to be interpreted as contracts and failed to heed this Court's restrictions on the power of federal courts to substitute their discretion for the discretion committed to the executive and legislative branches of state governments. The mandatory injunction imposed below threatens the ability of the MTA to fulfill its federal and State statutory obligations by imperiling federal and State funding which is the lifeblood of the MTA.

Institution of Litigation. In August 1994, respondents (collectively, the Bus Riders Union ["BRU"]) filed a civil rights action against the MTA and its named officers charging violation of 42 U.S.C. §§ 1981, 1983 and of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Respondents claimed that the MTA disparately treated bus riders (a majority of whom were people of color) and train riders (a majority of whom were white) by spending a disproportionate amount of its revenues on rail systems as opposed to bus service and by providing poorer equipment and service to minority riders than to white riders.[1]

Settlement Agreement Embodied in the Decree. In 1996, shortly before trial, the parties entered into a settlement agreement that was thereafter embodied in the Decree. Mr. Donald Bliss, a private lawyer, was the mediator who

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[1] The MTA produced substantial evidence in the district court that the assumed disparity in the treatment of people of color and white bus and train riders was nonexistent. Respondents introduced no contrary evidence.

assisted the parties in reaching the settlement. The Decree named him as a special master to try to resolve disputes arising from the Decree.

Because the MTA is a highly regulated public agency with multiple federal and State obligations, the Decree expressly limited the MTA's responsibilities thereunder to those which are consistent with its "other statutory responsibilities and obligations." (App. F at 174a.) The Decree also limited the MTA's expenditures for bus services to "bus-eligible revenue realized in excess of funds already specifically budgeted for other purposes." (*Id.* at 174a.)

The Pivotal Issue Before the Special Master. In 1998, disputes arose which the parties could not settle. The critical issue was whether the MTA had failed to comply with the provisions of the Decree obliging the MTA to reduce the number of bus standees during rush hours. (App. F at 175a-177a.) The Decree set "load factor targets" for the MTA to meet in reducing standees over time. (*Id.* at 175a.) A "load factor target" is a term of art in the bus transit industry which is used by specialists to estimate the number of buses that will be needed to accommodate anticipated passenger demand for service on ordinary days.[2] Those goals are defined as averages over 20-minute peak periods. The averaging component means that during measurement periods in rush hours, the MTA can have some buses that exceed the target without violating

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[2] Load factor targets are also used by those managing bus transit systems in preparing budgets and as performance measures. The terminology was taken directly from the MTA's then existing "Consolidated Service Transit Policy."

the Decree. These goals are not and cannot be certitudes because they are affected by multiple variables over which the transit agency has no control; *e.g.*, traffic jams, freeway accidents, unanticipated mechanical failures, bus drivers' illnesses, bad weather and passengers' own choices.

The Decree never required the MTA to buy a bus whenever a target was missed. The Decree specifically preserved to the MTA its discretion as to how the targets were to be met, and the MTA promised to "plan to make available sufficient additional buses and other vehicles" to meet these target load factors. (App. F at 176a.) It agreed to prepare a public report each fiscal year setting forth its plan to meet the targets while "recognizing that changes in ridership, fares, the economy and other factors may require modifications to the plan." (*Id.* at 176a.) In deciding how to meet the standee reduction goals, the Decree was explicit that bus financing was to be "consistent with MTA's other statutory responsibilities and obligations. . . . " (*Id.* at 174a.) If the MTA did not reach a goal, it promised to meet the target as soon as possible and to reallocate sufficient funds to meet the next target. (*Id.* at 177a.)

As required by the Decree (*id.* at 176a), the MTA presented its 1998 Load Factor Remediation Plan ("LFRP") to Mr. Bliss, contending that its LFRP (which was being implemented) complied with the Decree for the then current year and would comply with its next incremental standee reduction goal. The Decree was explicit that Mr. Bliss' authority on the load reduction issue was limited to deciding whether the MTA had met the current standee reduction goals and whether it had

allocated sufficient resources to meet the next target. (App. F at 177a.) Nothing in the Decree required the MTA to buy buses if targets were missed; targets could also be met by vehicles other than buses, such as vans or taxis.

The MTA produced declarations, documents and data collected between November 1997 through September 1998 to substantiate its claim that it was meeting and would meet its obligations under the Decree. Mr. Bliss took no evidence to interpret the Decree, nor did he take any evidence regarding the MTA's financial ability to reach its standee reduction goals beyond the stretch objectives of its own LFRP.

The Special Master's Erroneous Conclusion and "Order." Mr. Bliss' conclusion that the LFRP was inadequate was based on his construing the Decree's load factor targets as mathematically precise requirements that the MTA had to achieve every day on every covered line under all conditions and on his assumption that the LFRP did not provide enough buses to meet the targets as he construed that terminology.[3] He disregarded provisions of the Decree with respect to MTA's capacity to finance and operate such an expanded fleet, and he made no finding about its ability to comply with its other statutory obligations if it were forced to exceed its LFRP.

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[3] As a mediator negotiating the settlement, Mr. Bliss may have intended the load factor targets to be mathematical certitudes for ease in finding violations, but his intent is irrelevant. The parties' intent controls; consent decrees "should be construed basically as contracts," although they are also judgments. *United States v. ITT Continental Baking Co.*, 420 U.S. at 236-37; *United States v. Armour & Co.*, 402 U.S. at 681-82.

Although nothing in the Decree purported to confer on Mr. Bliss the equitable powers of federal courts, he issued an "order" requiring the MTA to buy 532 more buses than the agency's LFRP provided. Mr. Bliss disregarded the explicit provisions of the Decree leaving to the MTA's discretion the manner of meeting the targets, and he also disregarded the terms of the Decree stating that the targets could be met by vehicles other than buses. (App. F at 176a.)

The MTA requested Mr. Bliss to clarify and to modify his recommendations on the grounds, *inter alia*, that he had prejudicially erred in interpreting the Decree and that his authority thereunder did not include the power to issue a mandatory injunction. On May 14, 1999, Mr. Bliss slightly modified his "order" by reducing the number of mandatory bus purchases from 532 to 481. (App. E at 157a-158a.)

Proceedings Before the District Court. The district court granted the MTA's request for a hearing to review Mr. Bliss' "order." The court received extensive oral and documentary evidence; it also received briefs and heard oral argument. The MTA produced substantial evidence that it was in compliance with the Decree as properly interpreted and that it would meet the next target by implementing its LFRP. It produced uncontradicted evidence that (1) the term "load factor target" is a term of art in the transit industry which is a goal, not a precise measurement; (2) the MTA did not have the financial ability to buy and put into service more buses than its LFRP provided while simultaneously meeting its statutory obligations to the users of its other transportation facilities and services; (3) it could not obtain all the required federal

and State prior approvals necessary to further expand its fleet; and (4) enforcement of Mr. Bliss' "order" jeopardized the MTA's existing and future federal and State funding sources.

The MTA's evidence was uncontroverted that the MTA had then allocated to the bus system virtually *all* bus-eligible funds. Its projected deficits for the fiscal years 2001 to 2004 were between $118 million and $197 million alone without the mandated bus purchases. If Mr. Bliss' bus purchasing "order" were enforced, it would require further capital funding of approximately $115.8 million and operating funds of $97 million over 5 years.[4] The MTA was unable to identify any source of operating funds necessary for Mr. Bliss' expansion of its permanent fleet; the mandated increase in its fleet would increase the MTA's projected deficit to an unmanageable and irresponsible level. The BRU's opposition consisted of speculation that the MTA might have been able to find more federal and State funding if it had tried harder.[5]

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[4] At the time of the district court hearing, the MTA was spending approximately 44% of its total capital and operating budget for fiscal year 2000 on its bus system. Rail services consumed 22% of its budget. Highways and other programs consumed approximately 21%, and the remainder was spent on debt service. All discretionary funds available to the MTA and not currently programmed for bus operations were being used to fund other statutory obligations and responsibilities.

[5] Respondents' own expert witnesses conceded in the district court that no admissible evidence existed to contradict the MTA's testimony that it could not fund further improvements of bus service.

The District Court Ignored This Court's Decisions Requiring Consent Decrees to be Construed as Contracts and Limiting Federal Court Interference With Discretion Committed to State Agencies. That court disregarded this Court's decisions holding that consent decrees are to be construed as contracts, not solely as judicial decrees. *ITT Continental Baking Co.*, 420 U.S. at 236-37; *Armour & Co.*, 402 U.S. at 681-82. It also ignored the holdings of this Court forbidding federal courts to substitute judicial discretion for state or local governments' discretion and from mandating conduct when no constitutional violation had been adjudicated. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992); *Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977).

Without explanation, the district court adopted Mr. Bliss' interpretation of the load factor targets and rejected the uncontradicted testimony before it that such goals are not absolutes in the transit industry. That court relied only on the evidence which had been presented only by declarations and exhibits to Mr. Bliss and not on the up-to-date testimony and documentary evidence offered to the district court. The proceedings before Mr. Bliss did not include evidence of intent of the parties.

The district court ignored the MTA's evidence that it could not find funds to operate buses beyond those required to implement its own LFRP while simultaneously meeting the statutory conditions precedent with which it had to comply; it disregarded the MTA's

evidence that enforcement of Mr. Bliss' "order" imperiled the MTA's existing and future funding.[6]

The district court modified Mr. Bliss' "order" by slightly reducing the number of buses that the MTA was mandated to purchase and remanded one issue to Mr. Bliss; in all other respects the court "affirmed" Mr. Bliss'

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[6] Among the many state and federal transportation and environmental statutes and regulations with which the MTA is required to comply are the following: 23 U.S.C. §§ 103-105 (establishment of eligibility and various approvals required for expenditure of National Highway System funds); 23 U.S.C. § 134 (regional transportation planning process requirements and requirements for expenditure of funds in a Transportation Improvement Program); 23 U.S.C. § 149 (sets eligible uses of Congestion Mitigation and Air Quality Improvement Program funds); 49 U.S.C. § 5303, et seq. (establishing a regional transportation planning process and setting criteria to be used in the process; stating requirements for expenditure of funds); 42 U.S.C. §§ 4321-4347 (National Environmental Policy Act); 49 U.S.C. § 5303, et seq. (reallocation of the MTA's resources cannot be undertaken without the Southern California Association of Governments' determination that such reallocation will not worsen the South Coast Air Basin's air quality; new expenditures also require approval of the Federal Highway Administration, the Federal Transit Administration and the Environmental Protection Agency); 23 U.S.C. § 134(h)(6); 49 U.S.C. § 5304(b), (c). Additional statutes require the MTA to provide public notice and allow the public a reasonable opportunity to comment on new purchases and any shift in funds to buses from other programs. 49 U.S.C. § 5304(d); Cal. Pub. Util. Code § 130106. Still other statutes set other statute and regulatory hurdles to be crossed before fleet expansion could be undertaken by the MTA. *E.g.*, Cal. Pub. Util. Code § 130001(b); 42 U.S.C. § 4321, et seq. (National Environmental Policy Act); 23 C.F.R. § 771.105; 42 U.S.C. § 7410 (Clean Air Act).

"order" as if it were reviewing an order of a federal magistrate judge serving as special master.

The Court of Appeals Affirmed the District Court and Failed to Follow This Court's Decisions. Petitioners appealed. The case was orally argued and submitted on May 2, 2000. On April 27, 2001, the Court of Appeals ordered the parties to file supplemental briefs addressing the impact of *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (curtailing private civil rights actions alleging disparate treatment of minorities) and two cases decided by the Seventh Circuit. The majority and dissenting opinions were filed on August 31, 2001, without mentioning any of the cases that the parties briefed in response to the appellate court's order.

The majority opinion of the court affirmed the district court without responding to the issues presented to that court which are presented here. Despite petitioners' discussion of *ITT Continental Baking* and *Armour & Co.*, the majority held that the Decree should be construed only as a judgment. According to the majority opinion, federalism concerns evaporated because the MTA supposedly consented to whatever interpretation of the Decree that Mr. Bliss chose to impose and likewise supposedly consented to his assuming the powers of a federal jurist.

The majority opinion concludes the MTA's impending loss of State and federal funding caused by the district court's mandatory injunction is of no significance because its loss of funding would not violate the funding statutes:

> [T]he federal and state laws to which MTA refers are simply funding provisions with which MTA *may* choose to comply. The reward for compliance is state and federal funding. However, failure to follow the requirements of the funding mandates is not a violation of the law. At most, it might disqualify MTA from entitlement to receive funds. MTA's compliance with the district court's order would no more violate federal law than would a state legislature's decision to lower the statutory drinking age below twenty-one in spite of the federal law that conditions receipt of federal funds on a drinking age of twenty-one or older. [Citations omitted.] The state might lose federal highway funds under federal law, but it would not be in violation of that law. Thus, the district court did not abuse its discretion.

263 F.3d at 1051. (Emphasis in original.)

That opinion never explains how the MTA can obey the courts' mandates without the essential funding to do so, nor why the MTA's inability to comply with statutory mandates is not itself a violation of law. Although the MTA called *ITT Continental Baking Co.* and *Armour & Co.* to the Court of Appeals' attention, the panel failed to follow or even mention those cases.

The majority opinion cites *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992), to support its conclusion that the Decree should be interpreted only as a judgment. (App. A at

13a.) The court's reliance on *Rufo* for that point is misplaced.[7] In *Rufo*, the issue was whether that consent decree was subject to modification under Rule 60(b), Federal Rules of Civil Procedure; the consent decree had been entered after the jail conditions attacked had been adjudicated unconstitutional.

The Court of Appeals' Opinion Cannot Be Reconciled with this Court's Decisions. The courts below ignored the MTA's evidence explaining the source and meaning of the load factor targets' language used in the Decree. The Ninth Circuit simply repeated the district court's conclusion (adopting Mr. Bliss' interpretation of the terminology) that the load factor targets "set out a mathematically precise method of measuring bus overcrowding and a detailed schedule of load factor targets that were to be met by specific dates." (App. A at 14a.) No evidence was before Mr. Bliss or the lower courts to sustain those conclusions. Because this Court requires consent decrees to be interpreted as contracts for enforcement purposes, the intention of the parties in using the load factor target terminology in the Decree is crucial. The MTA unquestionably intended to use the terminology as it was used in the transit industry. The record contains no other evidence of the intent of the parties.

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[7] However, *Rufo* is directly relevant on a different point: "Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." [Citation omitted.] 502 U.S. at 389.

Like the district court, the Court of Appeals disregarded the substantial, uncontradicted evidence presented by the MTA establishing that it had no bus-eligible resources to operate a bus fleet expanded beyond its own remedial plan. Instead, the majority concluded that Mr. Bliss' factual finding that the MTA had not exhausted all sources of revenue was not clearly erroneous. Neither Mr. Bliss nor the courts below identified or quantified such funding sources or decided how any such financial resources would be sufficient to fulfill the judicial mandates and the MTA's statutory obligations.

The courts below failed to recognize that the data upon which Mr. Bliss reached his conclusions were out of date when the district court heard the case. The lower courts prejudicially erred in relying on the stale evidence and ignoring the MTA's abundant evidence proving that it was in compliance with the Decree as correctly construed. By the time the Ninth Circuit decided the case, the evidence before Mr. Bliss was ancient transit history. Like the district court, the Court of Appeals relied on Mr. Bliss' findings and conclusions as if they had been timely made by a federal judge correctly construing the Decree and relying on current evidence.

The majority opinion accepted the district court's erroneous conclusion that the Decree gave Mr. Bliss the equitable powers of a federal judge because the inartful settlement agreement embodied in the Decree gave him authority to resolve disagreements. (App. A at 17a.)[8] It

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[8] Of course, he could resolve disputes by helping the parties reach an agreement or by recommending a proposed

rejected the MTA's contention that Mr. Bliss did not and could not have the powers of a federal judge invoking a quasi-estoppel theory based on the MTA's erroneously seeking a temporary restraining order from Mr. Bliss to forestall a threatened strike years ago. (App. A at 17a-18a.) The MTA could not confer on Mr. Bliss federal equitable power by its former lawyers' mistake. No one can confer federal judicial powers on any person in private law practice.

Contrary to this Court's directions in *Youngberg v. Romeo*, 457 U.S. 307, 323, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982), neither the district court nor the Court of Appeals gave the slightest deference to the expertise of the MTA in managing its extremely complex integrated public transportation systems. Those courts also ignored *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (federal courts cannot second guess expert administrators on matters on which they are better informed, nor can they intrude into agencies' management of their affairs, except to cure federal statutory or constitutional violations). Neither the courts below nor Mr. Bliss has had any experience or expertise in managing a major public transportation system.

Even when federal courts have undertaken remedial decrees after a violation of constitutional rights has been adjudicated, compliance with judicial decrees has not been made absolute. Judicial inquiry is limited to ascertaining whether unlawful conduct has been "eliminated

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order to the district court. *E.g.*, Rule 53, Federal Rules of Civil Procedure.

to the extent practicable." *Freeman v. Pitts*, 503 U.S. 467, 492, 112 S. Ct. 1430, 118 L. Ed. 2d 102 (1992) (quoting *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249-50, 111 S. Ct. 630, 112 L. Ed. 2d 715 (1991). Compliance with the district court's mandatory injunction, affirmed by the Court of Appeals, is not practicable because the MTA can neither obtain the prior approvals mandated by statute nor can it fund the courts' mandates.

The majority opinion never mentions *Rizzo v. Goode*, 423 U.S. 362, 378-80, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) (considerations of federalism require reversal of a lower court's remedial order revising the internal operations of a state or local agency in absence of extraordinary circumstances; federal courts must respect state governments' wide latitude in conducting their own internal affairs). No such extraordinary circumstances existed in this case.

The injunction is excessively intrusive. The lower courts disregarded the fact that the Decree specifically gives the MTA exclusive discretion in deciding how to meet load factor goals, and they ignored the constraints imposed by this Court on federal courts to avoid collisions with constitutionally required separation of powers and with established federalism principles. Running complex public transportation systems, like running a prison, "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84-85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

REASONS FOR GRANTING THE WRIT

This case is singularly important to the State of California, the County of Los Angeles, the MTA and to millions of persons who depend upon the MTA's public transportation facilities and services.

The Ninth Circuit's opinion cannot be reconciled with this Court's decisions sharply limiting federal judicial intrusion into the affairs of state and local governments and their agencies absent an adjudicated constitutional or federal statutory violation.

By failing to follow *ITT Continental Baking Co.*, 420 U.S. 223, and *Armour & Co.*, 402 U.S. 673, the Ninth Circuit has placed itself in conflict with *Lamphere v. Brown University*, 875 F.2d 916, 921 (1st Cir. 1989); *EEOC v. New York Times Co.*, 196 F.3d 72, 78 (2d Cir. 1999); *Harris v. City of Philadelphia*, 137 F.3d 209, 212 (3d Cir. 1998); *Johnson v. Robinson*, 987 F.2d 1043, 1046 (4th Cir. 1993); *United States v. Michigan*, 940 F.2d 143 (6th Cir. 1991); *Ahern v. Board of Education of City of Chicago*, 133 F.3d 975, 981 (7th Cir. 1998); *Musso v. University of Minnesota*, 105 F.3d 409, 411 (8th Cir. 1997); and *United States v. Western Electric Co.*, 894 F.2d 430, 435 (D.C. Cir. 1990).

Unless these errors are corrected by this Court, the MTA will be bound to adhere to the Court of Appeals' prejudicially erroneous decision that the Decree required it to meet the standee reduction goals precisely every day on every line – an impossible goal to which the MTA never agreed – and to do so by buying more buses than the Decree obligated it to purchase and without the prior approvals and funding necessary to operate the MTA's multi-modal transportation systems.

The Decree provides for its own termination if the MTA is in compliance with the Decree. (App. F at 185a.) If not overturned by this Court, the MTA is wrongfully forced into noncompliance, thereby threatening it with continuing intrusive management by Mr. Bliss and by the federal courts. Unless this Court in exercise of its supervisory powers overturns the Ninth Circuit, that court's disobedience to this Court's decisions will be uncorrected and the intercircuit conflict will persist.

The financial pernicious anemia imposed on the MTA by the errors of the courts below threatens its existence as an agency capable of meeting its statutory obligations and the transportation needs of millions of people dependent on the MTA's systems, including bus riders.

CONCLUSION

For all of these reasons, Petitioners respectfully request that the Petition be granted.

Respectfully submitted,

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Dated: January 11, 2002

(2)

No. 01-___

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY; FRANKLIN E. WHITE, MTA Chief Executive Officer in his Individual and Official Capacities; JOSEPH NMI DREW, MTA Acting Chief Executive Officer in his Individual and Official Capacities,

Petitioners,

vs.

LABOR/COMMUNITY STRATEGY CENTER; BUS RIDERS UNION; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF GREATER LOS ANGELES COUNTY; KOREAN IMMIGRANT WORKERS ADVOCATES; MARIA GUARDADO; RICARDO ZELADA; NOEMI ZELADA; PEARL DANIELS; HENRY FREDERICK RAMEY, JR.; O. HOWARD WATTS; WILLIAM TUT HAYES; VICTOR DIBAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

LABOR/COMMUNITY STRATEGY CENTER; Bus Riders Union; Southern Christian Leadership Conference of Greater Los Angeles County; Koren [sic] Immigrant Workers Advocates; Maria Guardado; Ricardo Zelada; Noemi Zelada; Pearl Daniels, Plaintiffs-Appellees,

v.

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant-Appellant,

and

Julian Burke, MTA Chief Executive Officer in his individual and official capacities, Defendant.

No. 99-56581.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 2, 2000

Filed Aug. 31, 2001

Shirley M. Hufstedler, Morrison & Foerster, Los Angeles, California, for the defendant-appellant.

E. Richard Larson, Erica J. Teasley, NAACP Legal Defense and Educational Fund, Inc., Los Angeles, California; Constance L. Rice, English Munger & Rice, Los Angeles, California; Elaine R. Jones, Norman J. Chachkin, Theodore Shaw, NAACP Legal Defense and Educational Fund, Inc., New York, New York, for the plaintiffs-appellees.

Robert Garcia, Environmental Defense Fund; Joel Reynolds, Natural Resources Defense Council, Coalition for Clean Air; Stewart Kwoh, Asian Pacific Americal [sic] Legal Center of Southern California; Scott Kuhn, Communities for a Better Environment, for the amicus.

Appeal from the United States District Court for the Central District of California; Terry J. Hatter, Jr., District Judge, Presiding. D.C. No. CV-94-05936-TJH.

Before: BROWNING, HALL, and SILVERMAN, Circuit Judges.

Opinion by Judge SILVERMAN; Dissent by Judge CYNTHIA HOLCOMB HALL.

SILVERMAN, Circuit Judge:

A district court approved a consent decree that settled a civil rights lawsuit between a group of bus passengers and the Los Angeles County Metropolitan Transportation Authority ("MTA") concerning the quality of bus service in their community. Fourteen months later, after certain service improvement goals had not been met, the district court – first through a Special Master, then directly – entered detailed orders concerning the operation of the L.A. County transportation system, including an order that MTA immediately acquire 248 additional buses to reduce passenger overcrowding even if that meant diverting funds from other transportation services under MTA's jurisdiction. MTA appealed. Holding that the Special Master and district court correctly interpreted and applied the Consent Decree, and that the Special Master and district court acted within their power, we affirm the district court.

I. Facts

On August 31, 1994, a plaintiff class of Los Angeles County bus riders filed suit against MTA, alleging that MTA's transportation policies discriminated against minorities in violation of the Civil Rights Act of 1964 and the Fourteenth Amendment to the United States Constitution. MTA is the statutorily created regional transportation planning, construction, funding, and operating agency for Los Angeles County. The suit alleged that MTA was spending a disproportionately large portion of its budget on rail lines and suburban bus systems that would primarily benefit white suburban commuters, while intentionally neglecting inner-city and transit-dependent minority bus riders who relied on the city bus system. The lawsuit was triggered by MTA's decision to spend several hundred million dollars on a new rail line, foregoing an opportunity to reduce overcrowding problems on city buses, while at the same time increasing bus fares and eliminating monthly discount passes. In October 1996, after over two years of discovery and just before a trial was scheduled to begin, the parties reached a settlement and submitted to the district court a proposed consent decree that set forth a detailed plan to improve bus service.

A. The Consent Decree

Under the consent decree's terms, MTA agreed to make service improvements in the bus fleet to alleviate overcrowding and agreed to a set fare structure and fare increase procedure. In order to reduce bus overcrowding,

the decree set forth specific "load factor targets" ("LFTs")[1] that were to be met by specific dates:

> *Improved Performance Goal: Reduced Load Factor Targets.* MTA's performance in meeting this critical objective of responding to consumer demand for bus services efficiently shall be measured by the reduction in levels of crowding on board buses. MTA shall establish as a five-year goal to be reached by the end of the fifth complete fiscal year following the approval of this Consent Decree, the reduction of the maximum load factor ceiling for all bus routes from 1.45 to 1.2 in the following increments ("target load factors"):
>
> December 31, 1997, 1.35
>
> June 30, 2000, 1.25
>
> June 30, 2002, 1.2
>
> Thereafter, MTA shall maintain the 1.2 load factor for the duration of this Consent Decree.

The decree also called for the formation of a Joint Working Group ("JWG") made up of an equal number of representatives from the plaintiffs' class and MTA. The decree outlined the process by which the load factor targets were to be met:

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[1] A "load factor" is a numerical representation of the number of people standing on a bus in relation to the number of seats. It is calculated by dividing the total number of bus passengers riding a bus during a specific period of time (20 minutes in this case) by the total number of seats on the bus. A load factor of 1.35, for example, means that the average number of standees on a given bus during a given 20-minute period exceeds the number of seats by a factor of .35.

MTA Plans to Meet Targets. MTA will plan to make available sufficient additional buses and other vehicles to meet these target load factors. While MTA will have the discretion in determining how the targets will be met, MTA will consult with the JWG in formulating and implementing this plan. MTA will prepare at least 90 days prior to the beginning of each fiscal year, and make publicly available, a report setting forth its plan to meet the targets as of the date the report is issued, recognizing that changes in ridership, fares, the economy and other factors may require modifications to the plan. In addition, when MTA makes its scheduled modifications to its long range plan it shall incorporate plans to insure the availability and operation of the additional buses and other vehicles required to meet these targets. If ridership shall increase by more than 15 percent on any bus line MTA shall nevertheless make its best efforts to meet the target for that line and the target for that line may be deferred one (and only one) year. In addition, the JWG will designate a list of bus lines which may be exempted from the load factor requirement, such as lines with low frequency service.

As to how the improvements in load factors would be paid for, the decree stated:

> Consistent with MTA's other statutory responsibilities and obligations, MTA's first priority for the use of all bus-eligible revenue realized in excess of funds already specifically budgeted for other purposes shall be to improve bus service for the transit-dependent by implementing MTA's obligations pursuant to this Consent Decree. If sufficient funding is not provided to meet the obligations set forth in this Consent Decree, the matter shall be addressed in

> accordance with the procedures set forth in this Consent Decree.

The decree also outlined a procedure to be followed in the event that MTA failed to meet the required LFTs by the dates scheduled:

> *Failure to Meet Targets.* If MTA fails to meet the target load factors for all bus lines by the dates specified . . . , MTA shall meet the target as soon as possible and reallocate sufficient funds from other programs to meet the next lower target load factor as scheduled. The reprogrammed funds, which may include but not be limited to revenues from Propositions A and C discretionary funds, shall be used to meet the target load factors. Any dispute concerning whether the targets have been met; or if targets have not been met, whether sufficient funds have been reprogrammed to meet the next target will be reviewed by the JWG. If the JWG cannot resolve the matter it will be referred to the Special Master. The failure of MTA to meet the target load factors shall not be deemed a changed or unforeseen factual condition for purposes of seeking a modification of this Consent Decree by MTA.

The decree also provided for the appointment of a Special Master to facilitate the resolution of disputes. As to this dispute resolution process, the decree provided:

> Any dispute arising under any provision of Sections I through IV [which included the schedule of target load factor deadlines and funding reallocation requirements] of this Consent Decree in which the JWG has a role shall initially be addressed by the JWG. If the JWG cannot resolve the matter, or if the JWG does not have a role in the disputed function, this dispute shall be referred to the attorneys to the parties. If the attorneys cannot resolve the matter

> informally, the attorneys shall refer the matter to the Special Master for resolution, pursuant to procedures set forth by the Special Master. Any matter resolved by or referred to the Special Master may be reviewed by the District Court, along with the recommendations of the Special Master, if any, upon motion by either of the parties.

On October 29, 1996, the district court approved the consent decree.

B. The Special Master

Fourteen months later, soon after the first LFT deadline passed on December 31, 1997, the Special Master was pressed into service. The plaintiffs alleged that MTA had failed to meet the first LFT. In addition, the parties disputed the meaning of the LFTs, the extent to which MTA had or had not met its obligations under the consent decree, and the proper remedy to achieve compliance with the decree. After going through the preliminary dispute resolution procedure involving the JWG outlined in the decree, the parties submitted the dispute to the Special Master.

The Special Master set out a bifurcated procedure for resolving the matter. First, the parties were to brief the issue of how to measure compliance with the decree.[2]

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[2] In measuring compliance, MTA argued that the load factors for *all* bus lines during a given period of time should be compiled and averaged, then reduced by a certain factor to account for a standard number of mechanical failures. The Special Master rejected MTA's proposal, ruling that compliance with the LFTs had to be measured by looking at each *individual*

Second, once the Special Master had determined a method for measuring compliance, the matter was to be referred back to the JWG to determine whether MTA had fulfilled its obligations, and to craft a remedial plan if it had not. If the JWG could not agree on a remedial plan, the parties would then submit their respective remedial proposals to the Special Master for resolution of the issue.

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bus line. MTA had to show that during any 20-minute weekday period in the peak direction of travel on the line, the average ratio of passengers to seats available did not exceed the particular LFT. Under the Special Master's interpretation, a single bus line would be tested at a number of different points during the same 20-minute period. If the average of those test results exceeded the relevant target load factor, MTA would have failed to comply with the decree for that bus line. The Special Master based this interpretation on the language of the decree itself, such as the requirement that MTA reduce the maximum load factor ceiling "for all bus routes," and the definition of the peak load factor as the total number of passengers divided by the total number of seats "during any 20 minute weekday period in the peak direction of travel on each bus line."

The Special Master also resolved a dispute regarding the method of gathering load factor data. MTA argued that compliance should be measured by gathering data only during *fixed* time periods traditionally used by MTA, called the "fixed window" approach. The Special Master rejected this interpretation, holding that data could be gathered during *any* 20-minute period as long as that 20-minute window did not overlap with another 20-minute period. This was known as the "sliding window" approach. The Special Master based his interpretation on the language in the decree requiring the load ceiling to be achieved during "any" 20-minute period, and because he determined that the sliding window approach would provide a more accurate assessment of the load factor conditions on the buses.

In September 1998, the JWG found that MTA had failed to meet the decree's December 31, 1997, 1.35 LFT on 75 out of the 79 bus lines measured. The JWG could not agree on a remedial plan, so the parties again submitted briefs to the Special Master assessing the violations and proposing remedies.

The Special Master issued a "Memorandum Decision and Order" that attempted to steer a middle course between the competing remedial plans. In analyzing the submitted data, the Special Master found that the LFT violations were caused primarily by two factors: 1) "missing buses" – buses that were already in MTA's fleet and scheduled to run, but failed to show up on a given day for some reason (usually mechanical problems, but also lack of a driver, traffic problems, etc.); and 2) "insufficient capacity" – simply not having enough buses available in MTA's fleet to schedule sufficient service to meet demand on a particular line.

On the question of missing buses, the plaintiffs argued that 333 new buses were needed to solve the problem. However, the Special Master concluded that MTA's remedial plan to accelerate procurement of new buses and to convert unreliable alternative fuel vehicles to diesel power would adequately address the missing bus problem, and that no additional bus purchases were needed.

As to insufficient capacity, MTA proposed purchasing 130 new buses by June 2000, in addition to 53 that were already scheduled to be procured for fleet expansion. MTA also claimed that by more effectively managing its existing bus fleet it could increase the operating capacity

of the fleet, in effect getting more work out of the buses it already had rather than buying new buses to do that work. On the other hand, the plaintiffs proposed the purchase of 553 additional buses to meet the insufficient capacity problem. They argued that any reliance on MTA increasing its capacity through improved management would have been misplaced, given that MTA could have implemented the proposals earlier if they were really workable.

The Special Master ruled that MTA had overestimated the extent to which better management could resolve insufficient capacity problems and concluded that MTA's remedy would not resolve adequately the LFT violations. However, the Special Master also held that the plaintiffs had overestimated the number of buses required to fix the problem. Accordingly, the Special Master found that:

> [T]o remedy the load factor violations caused by 'insufficient capacity' the MTA would need to add a total of 430 new buses to the fleet (277 plus 55 spares to meet the [missed December 31, 1997] 1.35 LFT and 126 plus 25 spares to meet the [then-upcoming June 30, 2000] 1.25 LFT, minus 53 buses already scheduled by MTA for purchase).

Because of the inherent delay in the procurement process, the Special Master also held that further action was necessary:

> I have concluded that [the plaintiffs are] correct in [their] assertion that the MTA likely cannot meet the 1.35 load factor target "as soon as possible" (and the 1.25 load factor target by June 2000) unless it acts

> immediately to obtain additional buses on a temporary basis to remedy the load factor violations caused by insufficient capacity. In order to meet the requirements of Section II.A of the Consent Decree [setting forth the LFT deadlines], the MTA therefore should use its best efforts to lease or obtain, by whatever means available, at least 277 additional buses of any type appropriate for service on the MTA system. These buses should be scheduled for delivery on or before December 31, 1999 and should remain in service until the new buses required by the remedial plan are delivered. (Footnote omitted.)[3]

C. District Court

In accordance with the appeal provision of the consent decree, MTA challenged the Special Master's ruling in district court, claiming: 1) that the remedy imposed was based on an erroneous interpretation of the consent decree; and 2) the remedy ordered by the Special Master exceeded both his power and the power of the district court. The district court affirmed the authority of the Special Master and the district court to order a remedy under the decree. The court also found that "the Special Master's findings regarding compliance with the consent decree were not clearly erroneous." As to the Special Master's remedial plan, the district court stated its ruling as follows:

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[3] Although the Special Master initially ordered MTA to acquire 277 new buses, plus 55 spares, he reduced that number to 248 plus spares on May 14, 1999, following MTA's motion for clarification and modification of the March 6, 1999 order.

1. The Special Master's determination that 248[4] additional buses are needed, and must be purchased immediately, to resolve "insufficient capacity" violations so as to meet the 1.35 target load factor that should have been met be [sic] December 31, 1997 is affirmed. The MTA shall, within thirty days, through lease or by other means, obtain 248 buses on a temporary basis until the 248 purchased buses arrive.[5]

2. Given the apparent increased reliability of the MTA's current fleet, the Special Master shall reconsider whether the additional 49[6] buses he ordered the MTA to purchase for spares are still needed.

3. The Court believes that it is too early to determine whether MTA is incapable of meeting the 1.25 target load factor by June 30, 2000, given the current progress apparently made by the MTA and the age of the point check data presented to the Special Master and the Court. Therefore, the Special Master shall re-evaluate the likelihood of the MTA

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[4] The district court's bus count mirrors the Special Master's final order.

[5] The district court amended this portion of the order on October 6, 1999. The amended order required that, "MTA shall, by November 5, 1999, *contract* to obtain 248 buses on a temporary basis until the 248 purchased buses arrive. The 248 temporary buses shall be *placed into operation* no later than January 3, 2000."

[6] The 49 spare buses number appears to reflect the application of a standard 20% reserve replacement figure that the Special Master had used to calculate the number of new buses needed to the revised number of temporary buses ordered by the district court. Twenty percent of the 248 buses the district court ordered procured is approximately 49.

meeting the 1.25 target load factor after he is presented with more up-to-date point check date [sic].

(Footnotes added.)

MTA appealed the district court's ruling, and obtained a stay pending the appeal.

II. Standard of Review

A consent decree is enforceable as a judicial decree and "is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). This court reviews de novo the district court's interpretation of the consent decree, but must defer to the district court's factual findings underlying the interpretation unless they are clearly erroneous. *Gates v. Gomez*, 60 F.3d 525, 530 (9th Cir.1995); *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1432 (9th Cir.1994). We must "give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." *Gates*, 60 F.3d at 530 (quoting *Officers for Justice v. Civil Serv. Comm'n*, 934 F.2d 1092, 1094 (9th Cir.1991)).

A district court order requiring modification of a defendant's policy to comply with the consent decree "is effectively an injunction and will be reversed 'only where the district court abused its discretion or based its decision on an erroneous legal standard or clearly erroneous findings of fact.' " *Id.* A federal court enjoys broad equitable powers; its choice of equitable remedies is reviewed for an abuse of discretion. *Stone v. City and County of San*

Francisco, 968 F.2d 850, 861 (9th Cir.1992); *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 339 (7th Cir.1987).

III. Discussion

MTA advances the same two arguments to this court that it advanced to the district court: 1) the remedial plan imposed by the district court and the Special Master was based on a misinterpretation of the consent decree; and 2) the district court and the Special Master did not have the power to order MTA to implement the remedial plan. MTA is wrong about the first; the remedial plan was based on a correct interpretation of the consent decree, and MTA's claims to the contrary are without merit. Whether the court and the Special Master had the power to order MTA to immediately buy 248 new buses is a more difficult question.

A. Interpretation of the Consent Decree

1. Best Efforts

MTA's primary argument on the interpretation of the consent decree is that the load factor targets were simply performance goals that MTA promised to use its "best efforts" to meet, but with which the decree only required "substantial compliance." This argument is refuted by a reading of the decree as a whole. The decree set out a mathematically precise method of measuring bus overcrowding and a detailed schedule of load factor targets that were to be met by specific dates. After the five year schedule of descending load factor targets, the decree provided that "MTA *shall* maintain the 1.2 load factor for

the duration of this Consent Decree." (Emphasis added.) The decree also provided that in the event MTA missed one of the scheduled LFTs, MTA "*shall meet* the target as soon as possible and reallocate sufficient funds from other programs to *meet* the next lower target load factor as scheduled." (Emphasis added.) To say that MTA's "best efforts" are enough for compliance would be to ignore the precise load factor schedule set out in the decree.

MTA cites "best efforts" language in the decree out of context as support for its position. In context, however, the language actually weighs against MTA's argument. The decree provided that: "If ridership shall increase by more than 15 percent on any bus line MTA shall nevertheless make its best efforts to meet the target for that line and the target for that line may be deferred one (and only one) year." The passage clearly indicates that MTA was required to meet the load factor targets as scheduled. In the event of a large unexpected ridership increase, the decree released MTA from that obligation for one and *only* one year. It is clear that MTA's obligation was to meet the scheduled load factor targets, not simply to use its "best efforts."

2. Statutory Obligations

MTA claims that because it does not have sufficient funds to purchase new buses under the Special Master's remedial plan, the decree excuses compliance to the extent that the remedial plan would prevent MTA from meeting its other statutory obligations. In support of this

claim, MTA cites to the following language in the consent decree:

> Consistent with MTA's other statutory responsibilities and obligations, MTA's first priority for the use of all bus-eligible revenue realized in excess of funds already specifically budgeted for other purposes shall be to improve bus service for the transit-dependent by implementing MTA's obligations pursuant to this Consent Decree.

This argument overlooks other language in the *"Failure to Meet Targets"* section of the decree that addressed this specific situation and required MTA to "reallocate sufficient funds from other programs to meet the next lower target load factor as scheduled." Any dispute about the fund reallocation was to be settled by the JWG, or if necessary, the Special Master. The Special Master pointed out that MTA had failed to demonstrate that it lacked sufficient funds to otherwise meet its statutory obligations:

> In the MTA's May 4, 1998 draft Restructuring Plan, the MTA identifies the many funding sources for which bus capital and/or operating expenses are eligible. . . . For many of these bus-eligible funding categories, no funds at all have been allocated to buses. . . . Thus, the fact that the MTA apparently has not applied for, allocated or received these bus-eligible funds somewhat undercuts the MTA's argument that it will be forced to tap already-committed funds, and therefore violate its other statutory obligations, to comply with the Decree.

The Special Master's factual findings are entitled to deference and are reviewed for clear error. Fed.R.Civ.P. 53(e)(2). MTA has not pointed to any evidence suggesting

that the Special Master's factual finding that MTA had not exhausted all sources of funding was clearly erroneous.

B. Power to Require Compliance with the Decree

1. Special Master as Mediator

MTA argues that the consent decree reflected the parties' contemplation that the Special Master would mediate disputes, not resolve them. This argument is without merit.

In outlining the procedure for resolving disputes, the decree explicitly provided that if the lawyers could not resolve a problem referred from the JWG, they "shall refer the matter to the Special Master for *resolution*, pursuant to procedures set out by the Special Master." (Emphasis added.) Not for mediation. Not for suggestions. For *resolution*. The fact that the decree allowed the parties to challenge the Special Master's decisions in the district court is further evidence that the Special Master was intended to be a decisionmaker. For there to be something to appeal from, the Special Master must have had the power to make a decision.

MTA's argument also is quite disingenuous. Previously, when it suited MTA's purposes, it had claimed that the decree gave the Special Master vast powers to decide matters involving the parties. For example, when the plaintiffs began to organize a fare strike against MTA in retaliation for MTA's noncompliance with the load factor targets, MTA was only too happy to petition the Special Master for a temporary restraining order to enjoin the

strike. In arguing for the restraining order, MTA contended that even though the consent decree was silent about the Special Master's power to issue a TRO to enjoin a strike, the Special Master had broad powers unless specifically limited by the decree. At *that* time, MTA argued:

> [T]he Special Master was appointed to monitor the parties' compliance with, *and resolve any disputes arising under,* the Consent Decree. The Consent Decree does not impose any limitations on the Special Master's powers or authorities [sic] to effectuate these objectives. Accordingly, the Special Master has inherent authority to issue orders and resolve disputes arising under the Consent Decree.

(Emphasis added.) Under the decree's plain language, the Special Master had the power to resolve disputes, subject to appeal, and that is exactly what he did.

2. Scope and Intrusiveness of the Remedial Order

Finally, MTA raises federalism concerns regarding the Special Master's and district court's remedial order. Specifically, MTA contends that the order requires MTA to violate state and federal environmental laws. We reject this contention and find that the district court did not abuse its discretion because (1) MTA consented to this dispute resolution, (2) MTA had the opportunity to comply with the Consent Decree but failed to do so, and (3) the remedial order does not require a violation of state or federal laws.

When imposing a remedial scheme on a state institution, a federal court must not unduly insert itself into the

institution's management. However, "federalism concerns in institutional reform litigation . . . do not automatically trump the powers of federal courts to enforce the Constitution or a consent decree." *Stone*, 968 F.2d at 861. "[S]everal courts have held that federalism concerns do not prevent a federal court from enforcing a consent decree to which state officials have consented." *Id.* at 861 n. 20 (citing *United States v. City of Yonkers*, 856 F.2d 444, 454 (2d Cir.1988), *rev'd in part on other grounds sub nom. Spallone v. United States*, 493 U.S. 265, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990); *Allen v. Alabama State Bd. of Educ.*, 816 F.2d 575, 577 (11th Cir.1987); *United States v. District of Columbia*, 654 F.2d 802, 808 & n. 11 (D.C.Cir.1981)). MTA's consent to this form of dispute resolution relieves many federalism concerns.

Moreover, the remedial order does not violate the general principle that "federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs." *Milliken v. Bradley*, 433 U.S. 267, 280-81, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). MTA failed to comply with the Consent Decree before there ever was a Special Master's order. After being found in violation of the Consent Decree, MTA had the opportunity to submit its own effective remedial scheme. The Special Master made detailed findings, reasonably concluded that MTA had submitted an inadequate remedial scheme, and meticulously fashioned the remedial order.

Finally, the federal and state laws to which MTA refers are simply funding provisions with which MTA *may* choose to comply. The reward for compliance is state and federal funding. However, failure to follow the

requirements of the funding mandates is not a violation of the law. At most, it might disqualify MTA from entitlement to receive funds. MTA's compliance with the district court's order would no more violate federal law than would a state legislature's decision to lower the statutory drinking age below twenty-one in spite of the federal law that conditions receipt of federal funds on a drinking age of twenty-one or older, 23 U.S.C. § 158. *See South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). The state might lose federal highway funds under federal law, but it would not be in violation of that law. Thus, the district court did not abuse its discretion.

The district court's order is AFFIRMED.

CYNTHIA HOLCOMB HALL, Circuit Judge, dissenting:

It is firmly established that, in tailoring a remedy, "federal courts should 'exercise the least possible power adequate to the end proposed.' " *Stone v. San Francisco*, 968 F.2d 850, 861 (9th Cir.1992) (quoting *Spallone v. United States*, 493 U.S. 265, 280, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990)). Where the remedy is directed toward a state or local governmental entity, the federal court also must give "appropriate consideration . . . to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); *see also Stone*, 968 F.2d at 860-61. Federal courts "should always seek to minimize interference with legitimate state activities in tailoring remedies." *Id.* at 860. Because I believe the district court failed to fully account for these limitations on its remedial authority, I respectfully dissent.

I.

The majority concludes that MTA's consent to the dispute resolution mechanism in the consent decree "relieves many federalism concerns." *Supra* at 1050. Some courts have concluded that potential federalism problems posed by a consent decree involving a state governmental entity do not arise because the state entity has consented to the provisions of the decree, thus "waiving" any federalism objections. *See* Alan Effron, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L.Rev. 1796, 1801 n. 31 (1988) (citing *United States v. City of Yonkers*, 856 F.2d 444, 454 (2d Cir.1988), *rev'd in part on other grounds sub nom., Spallone v. United States*, 493 U.S. 265, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990); *Allen v. Alabama State Bd. of Educ.*, 816 F.2d 575, 577 (11th Cir.1987); *United States v. District of Columbia*, 654 F.2d 802, 808 & n. 11 (D.C.Cir.1981); *Duran v. Carruthers*, 678 F.Supp. 839, 847, 852-53 (D.N.M.1988); *see also Massachusetts Ass'n for Retarded Citizens v. King*, 643 F.2d 899, 904 (1st Cir.1981)). Other courts, however, have recognized that the state entity's consent to a consent decree does not eliminate all federalism concerns, particularly the federalism limitations on the power of a federal court to intrude on matters of state governance. *See Federalism and Federal Consent Decrees*, 1801 n. 32 & 33 (citing *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 340-41 (7th Cir.1987); *Georgevich v. Strauss*, 772 F.2d 1078, 1085 (3d Cir.1985) (en banc); *Duran v. Elrod*, 713 F.2d 292, 297 (7th Cir.1983); *United States v. Michigan*, 116 F.R.D. 655, 661 (W.D.Mich.1987)). Our own circuit has expressed skepticism that a state's consent to a consent decree eliminates federalism concerns. *See Stone*, 968 F.2d at 861 n. 20 ("We

hesitate to follow those cases that hold that the state waives federalism objections when it enters a consent decree because the state actors involved in th[e] case have not clearly consented to the federalism intrusions.").

Yet even if MTA's consent to the decree eliminated the federalism problems posed by the entry of the decree itself, MTA's consent does not extend to any and all *remedies* ordered for MTA's failure to comply with the decree. MTA consented to the terms of the decree, including the Load Factor Targets ("LFTs") and the special master's role in resolving disputes. MTA did *not*, however, consent to the particular *remedy* ordered for its failure to meet the LFTs. Although the terms of any remedial order must be consistent with the terms of the consent decree, it does not follow that the remedial order is a part of the consent decree to which MTA consented. Thus, to whatever extent MTA's consent to the decree eliminated the potential federalism problems posed by the entry of the decree, MTA's "waiver," if any, of its federalism objections does not extend to eliminate the federalism problems raised by the remedial order. Instead, the proper scope of the remedy in the instant dispute over LFTs is governed by the principles in *Rizzo* and *Stone*, and federalism concerns must be considered.

Federalism concerns also are not eliminated simply by permitting MTA to submit a proposed remedy before the court orders a remedy of its own. *See supra* at 1050. State and local governments maintain a substantial interest "in managing their own affairs," even when a federal court is forced to step in. *Milliken v. Bradley*, 433 U.S. 267, 280-81, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). Merely providing the state entity an opportunity to submit a

suggested remedy, which is then subject to substantial alteration by the court, will not always satisfy that interest. The court must take care that its remedy does not interfere in the state entity's legitimate activities any more than is necessary to remedy the precise violation at issue. *See Spallone*, 493 U.S. at 280, 110 S.Ct. 625.

Further, unlike MTA, federal courts are not in the business of running and funding local transportation systems. *See Stone*, 968 F.2d at 860 (recognizing that federalism concerns include concerns of institutional competence). For this reason, a substantial measure of deference to the local agency generally is appropriate. *See id.* at 863 (approving the numerous opportunities afforded the city to formulate its own remedial plan and bring itself into compliance with the decree). Unfortunately, in the instant dispute, MTA put forward a remedial plan that was based on data covering only 20 of the 79 bus lines at issue. Because of MTA's failure to prepare a plan that addressed all of its LFT violations, the special master and district court could not fully defer to MTA's proposed plan. Nonetheless, MTA's failure to submit an adequate plan does not relieve the district court from its obligation to craft a remedy that is no more intrusive than necessary, which, in my view, the court failed to do.

II.

Before expanding its bus fleet, MTA is required by statute to obtain numerous state and federal transportation and environmental approvals. *See, e.g.*, 23 U.S.C. §§ 103-05 (establishing eligibility and approvals required for expenditure of National Highway System funds); 23

U.S.C. § 134 (requiring a regional transportation planning process and establishing requirements for expenditures of funds in a Transportation Improvement Program); 23 U.S.C. § 149 (establishing eligible uses of Congestion Mitigation and Air Quality Improvement Act funds); 49 U.S.C. § 5303, et seq. (requiring a regional transportation planning process, establishing criteria to be used in the planning process, and setting forth requirements for expenditures of funds); *see also* 42 U.S.C. § 4321-4347 (National Environmental Policy Act). MTA also is required to obtain certain approvals before making significant expenditures or before reprogramming funds from one purpose to another. *See, e.g.*, 49 U.S.C. § 5303, et seq. For example, the Southern California Association of Governments must first determine that the reallocation of resources will not worsen the South Coast Air Basin's air quality before the amended expenditure can be approved, and the new expenditures would also require the approval of the Federal Highway Administration, the Federal Transit Administration, and the Environmental Protection Agency. *See* 23 U.S.C. § 134(h)(6); 49 U.S.C. § 5304(b) & (c). Other statutes require MTA to provide reasonable public notice and allow the public a reasonable opportunity to comment on the new purchases and the shift in funds to buses from other programs. *See, e.g.*, 49 U.S.C. § 5304(d); Cal. Pub. Util.Code § 130106. The only evidence before the special master and district court regarding the time required to obtain the necessary approvals was that it takes approximately *six months* for the agencies to approve changes in the programming of urban transportation funds and issue the necessary

approvals. But the district court and special master neither gave MTA enough time to secure these approvals nor made the remedy contingent upon obtaining them.

The special master dismissed MTA's federal and state law compliance concerns in a single paragraph:

> The MTA expresses the further concern that environmental statutes may pose obstacles to the implementation of the March 6 Memorandum Decision. Statutory obligations such as the National Environmental Policy Act (NEPA), the National Ambient Air Quality Standards (NAAQS) and the California Environmental Quality Act (CEQA) have always been an important consideration in planning any transportation project in California. Generally, adding additional bus capacity to improve service quantity should contribute positively to environmental quality. If despite the MTA's good faith efforts to implement an approved remedial plan there are unavoidable delays in complying with statutory requirements, these issues should be addressed in the quarterly reports.

The assumption that the bus purchases would improve environmental quality is very much open to question, given that the remedy was intended to increase the number of buses on the streets in order to reduce the number of standees among the *existing* ridership, not as part of a program to lure people out of their cars and onto public transportation, and the remedy may very well require a shift in resources from electric light-rail to gas-powered buses. Therefore, the special master had no sound basis for assuming that the various state and federal approvals would be forthcoming. Further, the special master's argument that any failures in complying with

federal law could be addressed at a later time was essentially abrogated by the district court's order that the new buses be purchased immediately and that the temporary buses be leased within 30 days and placed on the road within 90 days. The only record evidence was that the required approvals usually take six months to obtain. Moreover, neither the special master nor the district court addressed MTA's statutory public comment obligations.

MTA could not consent away its governmental powers and responsibilities or consent to override or ignore its statutory obligations. Nor could a federal court order MTA to override its statutory obligations, absent a violation of a federal right, which has not been adjudicated in this case. *See, e.g., Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs,* 142 F.3d 468, 477 (D.C.Cir.1998); *Keith v. Volpe,* 118 F.3d 1386, 1393 (9th Cir.1997). Compliance with the remedial order, however, would require MTA to violate its statutory obligations.

The majority concludes that MTA's failure to comply with its statutory obligations would not require it to violate any federal laws because the obligations are part of consensual funding programs. *Supra* at 1051. Although correct, that statement addresses only part of the picture. It is through such funding programs that MTA receives a substantial portion of its funding. By failing to comply with the statutory funding requirements, MTA risks incurring heavy penalties and losing substantial federal transportation funds. *See, e.g.,* 49 U.S.C. § 5305(e). MTA relies heavily on federal funds, and the loss of these funds could prove crippling. *See* Revised Decl. of David Yale (describing the sources of MTA's funds); *see also*

Cornelius v. Los Angeles County MTA, 49 Cal.App.4th 1761, 57 Cal.Rptr.2d 618, 628 (Ct.App.1996) (noting that in FY 1994-95, MTA received 29% of its revenues from the federal government). Moreover, such a loss is inconsistent with the consent decree's overall purpose to improve the quality of bus service in Los Angeles. As this case demonstrates, improved bus service requires substantial funding.

Further, if MTA "chooses" not to comply with the "strings" attached to its receipt of funds and gives up the funds, there is no evidence that MTA will otherwise be able to purchase and operate the hundreds of new buses ordered by the district court. Although there was evidence before the court to support the conclusion that MTA had not yet exhausted all possible sources of funding for new buses, that evidence also showed that MTA would have to comply with various statutory obligations in order to obtain those funds. There is no evidence in the record that MTA could purchase and operate the new buses without obtaining funds from programs that require MTA to go through planning and approval processes, the very same types of funding programs with which the remedial order prevents MTA from complying. There is no basis in the record for a remedial order that would require MTA to purchase and operate new buses without going through the steps necessary to allow MTA to fund the new buses. On the contrary, MTA's financial constraints "are a legitimate concern of governmental defendants in institutional reform litigation." *Rufo v. Inmates of Suffolk County*, 502 U.S. 367, 392-93, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992).

Beyond the unnecessarily intrusive nature of the remedial order, that the order prevents MTA from complying with the requirements of federal funding programs raises additional federalism problems. Congress uses cooperative funding schemes such as those involved here as a means of promoting federal policy. *See New York v. United States*, 505 U.S. 144, 167, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Congress offers federal funds in exchange for the state or local government's compliance with the federal policy and conditions that Congress attaches to the use of the funds. *See id.* at 166, 112 S.Ct. 2408. The consensual nature of these schemes is precisely the reason why their constitutionality is not open to question. *See generally South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). Here, however, the remedial order took that choice out of MTA's hands and in effect required MTA to take a certain position regarding federal policy. Where the state or local government unambiguously agrees to forego federal funds in the consent decree itself, fewer federalism concerns arise; when the state or local government agrees to the terms of the consent decree, it makes a choice to not participate in the federal program. But where a federal court's remedial order prevents participation in the funding scheme, the state or local government is denied its choice. In taking away that choice, the district court effectively shifts power from the state to a single branch of the federal government.

By taking the decision whether to comply with federal policy out of MTA's hands, the district court also raised troubling political accountability concerns. Making decisions on how to allocate resources among competing

interests generally is not the role of federal courts. Nor is it the role of federal courts to make decisions on whether a state or local governmental entity may participate in and comply with federal environmental and transportation schemes. As the Supreme Court has noted, under cooperative funding programs, "[i]f a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." *New York*, 505 U.S. at 168, 112 S.Ct. 2408. But where a federal court makes the choice, "elected state officials cannot regulate in accordance with the views of the local electorate." *Id.* at 169, 112 S.Ct. 2408. Accountability thus is diminished as the local officials "bear the brunt of public disapproval" while the federal court that made the decision remains insulated. *Id.* These concerns are particularly acute in the instant case because this suit arose against the backdrop of a dispute between citizens who wanted MTA to expand rail transportation and those who wanted more buses. By ordering enormous expenditures on buses while, at the same time, putting at risk a significant portion of MTA's funding, the district court added fuel to the fire, but hampered MTA's ability to respond.

MTA is not a private entity that has full discretionary authority over its funding; MTA's funds come with strings attached. The district court could have granted MTA sufficient time to comply with the state and federal approval processes or could have made the remedy contingent on MTA obtaining the required approvals. Instead, the district court put MTA in the position of either placing its funding at risk by purchasing buses without obtaining the necessary approvals or risking contempt of court by delaying its acquisition of buses while

the approvals were acquired. In my view, the district court failed to appreciate the unnecessarily intrusive nature of the remedy and failed to give appropriate consideration to federalism principles in fashioning relief. I would reverse and remand the case to permit the district court to craft a remedy that accounts for MTA's financial and statutory obligations. I therefore dissent.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LABOR/COMMUNITY STRATEGY CENTER; BUS RIDERS UNION; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF GREATER LOS ANGELES COUNTY; KOREN IMMIGRANT WORKERS ADVOCATES; MARIA GUARDADO; RICARDO ZELADA; NOEMI ZELADA; PEARL DANIELS, Plaintiffs-Appellees, and HENRY FREDERICK RAMEY, JR.; O. HOWARD WATTS; WILLIAM TUT HAYES; VICTOR DIBAS Plaintiffs-intervenors, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant-Appellant, and FRANKLIN E. WHITE, MTA Chief Executive Officer in his individual and official capacities; JOSEPH NMI DREW, MTA Acting Chief Executive Officer in his individual and official capacities, Defendants.	No. 99-56581 D.C. No. CV-94-05936-TJH ORDER (Filed Oct. 16, 2001)

Before: BROWNING, HALL, and SILVERMAN, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judge Silverman has voted to reject the petition for rehearing en banc and Judge Browning so recommends. Judge Hall also recommends denial of the petition for rehearing en banc and files an amended dissent.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

HALL, Circuit Judge, dissenting:

It is firmly established that, in tailoring a remedy, "federal courts should 'exercise the least possible power adequate to the end proposed.' " *Stone v. San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992) (quoting *Spallone v. United States*, 493 U.S. 265, 280 (1990)). Where the remedy is directed toward a state or local governmental entity, the federal court also must give "appropriate consideration . . . to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976); *see also Stone*, 968 F.2d at 860-61. Federal courts "should always seek to minimize interference with legitimate state activities in tailoring remedies." *Id.* at 860. Because I believe the district court failed to fully account for these limitations on its remedial authority, I respectfully dissent.

I.

The majority concludes that MTA's consent to the dispute resolution mechanism in the consent decree "relieves many federalism concerns." *Supra* at 21. Some courts have concluded that potential federalism problems posed by a consent decree involving a state governmental entity do not arise because the state entity has consented to the provisions of the decree, thus "waiving" any federalism objections. *See* Alan Effron, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796, 1801 n.31 (1988) (citing *United States v. City of Yonkers*, 856 F.2d 444, 454 (2d Cir. 1988), *rev'd in part on other grounds sub nom., Spallone v. United States*, 493 U.S. 265 (1990); *Allen v. Alabama State Bd. of Educ.*, 816 F.2d 575, 577 (11th Cir. 1987); *United States v. District of Columbia*, 654 F.2d 802, 808 & n.11 (D.C. Cir. 1981); *Duran v. Carruthers*, 678 F. Supp. 839, 847, 852-53 (D.N.M. 1988); *see also Massachusetts Ass'n for Retarded Citizens v. King*, 643 F.2d 899, 904 (1st Cir. 1981)). Other courts, however, have recognized that the state entity's consent to a consent decree does not eliminate all federalism concerns, particularly the federalism limitations on the power of a federal court to intrude on matters of state governance. *See Federalism and Federal Consent Decrees*, 1801 n.32 & 33 (citing *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 340-41 (7th Cir. 1987); *Georgevich v. Strauss*, 772 F.2d 1078, 1085 (3d Cir. 1985) (en banc); *Duran v. Elrod*, 713 F.2d 292, 297 (7th Cir. 1983); *United States v. Michigan*, 116 F.R.D. 655, 661 (W.D. Mich. 1987)). Our own circuit has expressed skepticism that a state's consent to a consent decree eliminates federalism concerns. *See Stone*, 968 F.2d

at 861 n.20 ("We hesitate to follow those cases that hold that the state waives federalism objections when it enters a consent decree because the state actors involved in th[e] case have not clearly consented to the federalism intrusions.").

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to submit a suggested remedy, which is then subject to substantial alteration by the court, will not always satisfy that interest. The court must take care that its remedy does not interfere in the state entity's legitimate activities any more than is necessary to remedy the precise violation at issue. *See Spallone*, 493 U.S. at 280.

Further, unlike MTA, federal courts are not in the business of running and funding local transportation systems. *See Stone*, 968 F.2d at 860 (recognizing that federalism concerns include concerns of institutional competence). For this reason, a substantial measure of deference to the local agency generally is appropriate. *See id.* at 863 (approving the numerous opportunities afforded the city to formulate its own remedial plan and bring itself into compliance with the decree). Unfortunately, in the instant dispute, MTA put forward a remedial plan that was based on data covering only 20 of the 79 bus lines at issue[1]. Because of MTA's failure to prepare a plan that addressed all of its LFT violations, the special master and district court could not fully defer to MTA's proposed plan. Nonetheless, MTA's failure to submit an adequate plan does not relieve the district court from its obligation to craft a remedy that is no more intrusive than necessary, which, in my view, the court failed to do.

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[1] In its petition for rehearing, MTA suggests that the district court misinterpreted "load factor targets" by failing to give this "technical term" its accepted meaning within the transportation industry, and therefore the court applied the wrong standard for determining the extent to which the consent decree was violated in the first place. While the argument has some appeal, unfortunately, MTA did not raise the argument in its briefs to this court.

II.

Before expanding its bus fleet, MTA is required by statute to obtain numerous state and federal transportation and environmental approvals. *See, e.g.*, 23 U.S.C. §§ 103-03 (establishing eligibility and approvals required for expenditure of National Highway System funds); 23 U.S.C. § 134 (requiring a regional transportation planning process and establishing requirements for expenditures of funds in a Transportation Improvement Program); 23 U.S.C. § 149 (establishing eligible uses of Congestion Mitigation and Air Quality Improvement Act funds); 49 U.S.C. § 5303, et seq. (requiring a regional transportation planning process, establishing criteria to be used in the planning process, and setting forth requirements for expenditures of funds); *see also* 42 U.S.C. § 4321-4347 (National Environmental Policy Act). MTA also is required to obtain certain approvals before making significant expenditures or before reprogramming funds from one purpose to another. *See, e.g.*, 49 U.S.C. § 5303, et seq. For example, the Southern California Association of Governments must first determine that the reallocation of resources will not worsen the South Coast Air Basin's air quality before the amended expenditure can be approved, and the new expenditures would also require the approval of the Federal Highway Administration, the Federal Transit Administration, and the Environmental Protection Agency. *See* 23 U.S.C. § 134(h)(6); 49 U.S.C. § 5304(b) & (c). Other statutes require MTA to provide reasonable public notice and allow the public a reasonable opportunity to comment on the new purchases and the shift in funds to buses from other programs. *See, e.g.*, 49 U.S.C. § 5304(d); Cal. Pub. Util. Code § 130106. The

only evidence before the special master and district court regarding the time required to obtain the necessary approvals was that it takes approximately *six months* for the agencies to approve changes in the programming of urban transportation funds and issue the necessary approvals. But the district court and special master neither gave MTA enough time to secure these approvals nor made the remedy contingent upon obtaining them.

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The assumption that the bus purchases would improve environmental quality is very much open to question, given that the remedy was intended to increase the number of buses on the streets in order to reduce the number of standees among the *existing* ridership, not as part of a program to lure people out of their cars and onto

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The majority concludes that MTA's failure to comply with its statutory obligations would not require it to violate any federal laws because the obligations are part of consensual funding programs. *Supra* at 21-22. Although correct, that statement addresses only part of the picture. It is through such funding programs that MTA receives a substantial portion of its funding. By

failing to comply with the statutory funding requirements, MTA risks incurring heavy penalties and losing substantial federal transportation funds. *See, e.g.*, 49 U.S.C. § 5305(e). MTA relies heavily on federal funds, and the loss of these funds could prove crippling. *See* Revised Decl. of David Yale (describing the sources of MTA's funds); *see also Cornelius v. Los Angeles County MTA*, 57 Cal. Rptr. 2d 618, 628 (Ct. App. 1996) (noting that in FY 1994-95, MTA received 29% of its revenues from the federal government). Moreover, such a loss is inconsistent with the consent decree's overall purpose to improve the quality of bus service in Los Angeles. As this case demonstrates, improved bus service requires substantial funding.

Further, if MTA "chooses" not to comply with the "strings" attached to its receipt of funds and gives up the funds, there is no evidence that MTA will otherwise be able to purchase and operate the hundreds of new buses ordered by the district court. Although there was evidence before the court to support the conclusion that MTA had not yet exhausted all possible sources of funding for new buses, that evidence also showed that MTA would have to comply with various statutory obligations in order to obtain those funds. There is no evidence in the record that MTA could purchase and operate the new buses without obtaining funds from programs that require MTA to go through planning and approval processes, the very same types of funding programs with which the remedial order prevents MTA from complying. There is no basis in the record for a remedial order that would require MTA to purchase and operate new buses without going through the steps necessary to allow MTA

to fund the new buses. On the contrary, MTA's financial constraints "are a legitimate concern of governmental defendants in institutional reform litigation." *Rufo v. Inmates of Suffolk County*, 502 U.S. 367, 1392-93 (1992).

Beyond the unnecessarily intrusive nature of the remedial order, that the order prevents MTA from complying with the requirements of federal funding programs raises additional federalism problems. Congress uses cooperative funding schemes such as those involved here as a means of promoting federal policy. *See New York v. United States*, 505 U.S. 144, 167 (1992). Congress offers federal funds in exchange for the state or local government's compliance with the federal policy and conditions that Congress attaches to the use of the funds. *See id.* at 166. The consensual nature of these schemes is precisely the reason why their constitutionality is not open to question. *See generally South Dakota v. Dole*, 483 U.S. 203 (1987). Here, however, the remedial order took that choice out of MTA's hands and in effect required MTA to take a certain position regarding federal policy. Where the state or local government unambiguously agrees to forego federal funds in the consent decree itself, fewer federalism concerns arise; when the state or local government agrees to the terms of the consent decree, it makes a choice to not participate in the federal program. But where a federal court's remedial order prevents participation in the funding scheme, the state or local government is denied its choice. In taking away that choice, the district court effectively shifts power from the state to a single branch of the federal government.

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raised troubling political accountability concerns. Making decisions on how to allocate resources among competing interests generally is not the role of federal courts. Nor is it the role of federal courts to make decisions on whether a state or local governmental entity may participate in and comply with federal environmental and transportation schemes. As the Supreme Court has noted, under cooperative funding programs, "[i]f a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." *New York*, 505 U.S. at 168. But where a federal court makes the choice, "elected state officials cannot regulate in accordance with the views of the local electorate." *Id.* at 169. Accountability thus is diminished as the local officials "bear the brunt of public disapproval" while the federal court that made the decision remains insulated. *Id.* These concerns are particularly acute in the instant case because this suit arose against the backdrop of a dispute between citizens who wanted MTA to expand rail transportation and those who wanted more buses. By ordering enormous expenditures on buses while, at the same time, putting at risk a significant portion of MTA's funding, the district court added fuel to the fire, but hampered MTA's ability to respond.

MTA is not a private entity that has full discretionary authority over its funding; MTA's funds come with strings attached. The district court could have granted MTA sufficient time to comply with the state and federal approval processes or could have made the remedy contingent on MTA obtaining the required approvals. Instead, the district court put MTA in the position of either placing its funding at risk by purchasing buses

without obtaining the necessary approvals or risking contempt of court by delaying its acquisition of buses while the approvals were acquired. In my view, the district court failed to appreciate the unnecessarily intrusive nature of the remedy and failed to give appropriate consideration to federalism principles in fashioning relief. I would reverse and remand the case to permit the district court to craft a remedy that accounts for MTA's financial and statutory obligations. I therefore dissent.

APPENDIX C

United States District Court
Central District of California
Western Division

LABOR/COMMUNITY STRATEGY CENTER, *et al.*,	)	CV 94-5936 TJH (MCx)
Plaintiffs,	)	**Memorandum Opinion and Order**
v.	)	
LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, *et al.*,	)	(Filed Sep. 23, 1999)
Defendants.	)	

Pursuant to the October 29, 1996, consent decree entered in this case, the Los Angeles County Metropolitan Transportation Authority ["MTA"] has asked the Court to review the Special Master's orders of March 6, 1999, and May 14, 1999.

In seeking review, the MTA raises several issues which can be consolidated into two. First, the Special Master's recommendations went beyond his powers and the powers of the Court. Second, the Special Master's findings and recommendations are clearly erroneous.

DISCUSSION

Authority of the Court and the Special Master

There should be no question that the Court and the Special Master possess the equitable powers to enforce the consent decree. This power stems not only from well-established case law, but, also, from the terms of the consent decree itself.

First, the consent decree clearly, and explicitly, states that all disputes shall be submitted to the Special Master for his resolution, and that the Special Master's resolutions may by *reviewed* by this Court. Given the complexity of any plan to reduce bus overcrowding, the consensual delegation of dispute resolution powers to the Special Master was appropriate. Further, in the November 21, 1996, Stipulation and Order of Reference, the MTA specifically, and unequivocally, empowered the Special Master to resolve disputes arising out of the consent decree.

Second, the MTA is estopped from asserting that the Special Master's authority is very narrow and finite. "Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600-1 (9th Cir. 1996). When the MTA asked the Special Master to issue an injunction to prohibit Plaintiff Bus Riders Union ["Bus Riders"] from encouraging a "No Seat, No Fare" strike, the Bus Riders argued that the Special Master lacked the explicit power to issue such an injunction. In response, the MTA argued that the Special Master's powers were very broad and implicitly

encompassed the authority to issue the injunction. Now that the MTA disfavors the Special Master's decision on a matter which he was explicitly empowered to resolve, the MTA makes a frontal attack on his authority. The MTA is estopped from doing so.

Third, a consent decree is a permanent injunction enforceable by the Court. *See Local 93, Int'l. Ass'n. of Firefighters v. Cleveland*, 478 U.S. 501, 517-18, 106 S. Ct. 3063, 3072-73, 92 L. Ed. 2d 405, 420-21 (1986). Generally, this Court has broad equitable remedial powers to enforce injunctions. *See Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 15, 91 S. Ct. 1267, 1275, 28 L. Ed. 2d 554, 566 (1971). Moreover, a remedial scheme embodied in a consent decree maybe even broader than a court-created equitable remedy after a trial on the merits. *Local 93*, 478 U.S. at 525, 106 S. Ct. at 3076, 92 L. Ed. 2d at 425 (1986). Furthermore, contrary to the MTA's contention, the enforceability of a consent decree is not dependant upon a prior determination of a constitutional violation. *See Stone v. San Francisco*, 968 F.2d 850, 862, n.20 (9th Cir. 1992).

By the clear language of the consent decree, the MTA had the *initial* responsibility to devise and implement a plan to reduce bus overcrowding. Since the MTA failed to meet the obligations imposed by the consent decree, it is now up to the Special Master and the Court – through the Court's equitable powers – to enforce the consent decree. *See Hutto v. Finney*, 437 U.S. 678, 687, 98 S. Ct. 2565, 2572, 57 L. Ed. 2d 522, 532 (1978).

Standard of Review

In non-jury matters – such as the equitable enforcement of a consent decree – the Court must accept the Special Master's findings unless they are clearly erroneous. Fed. R. Civ. P. 53(e)(2). This is in accord with the terms of the consent decree which clearly states that this Court may only review the Special Master's resolutions of disputes between the MTA and the Bus Riders.

Findings are clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (1948). If the Special Master's findings are "plausible in light of the record viewed in its entirety [the Court] may not reverse [the Special Master] even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518, 528 (1985).

Review of the Special Master's Orders

Given the detailed findings of the Special Master, and the evidence in support of his findings, the Court does not have a firm conviction that the Special Master made a mistake in determining that the MTA has not substantially complied with the consent decree in that the target load factor of 1.35 has not been met. Therefore, the Special Master's findings regarding compliance with the consent decree were not clearly erroneous.

As to the Special Master's remediation plan, it is affirmed as follows:

1. The Special Master's determination that 248 additional buses are needed, and must be purchased immediately, to resolve "insufficient capacity" violations so as to meet the 1.35 target load factor that should have been met by December 31, 1997, is affirmed. The MTA shall, within thirty days, through lease or other means, obtain 248 buses on a temporary basis until the 248 purchased buses arrive.

2. Given the apparent increased reliability of the MTA's current fleet, the Special Master shall reconsider whether the additional 49 buses he ordered the MTA to purchase for spares are still needed.

3. The Court believes that it is too early to determine whether the MTA is incapable of meeting the 1.25 target load factor by June 30, 2000, given the current progress apparently made by the MTA and the age of the point check data presented to the Special Master and the Court. Therefore, the Special Master shall re-evaluate the likelihood of the MTA meeting the 1.25 target load factor after he is presented with more up-to-date point check date. The Special Master shall evaluate the data using both static twenty minute periods and non-overlapping, sliding twenty minute periods. The Special Master shall use whichever calculation method that most accurately reflects the actual level of overcrowding experienced by bus riders.

As the Special Master reconsiders and re-evaluates the above items, he should consider, with the input of the Joint Working Group, the MTA and the Bus Riders, other

capacity increasing measures beyond the purchase of additional buses. For example, the Special Master should consider the movement of buses from less crowded lines to more crowded lines, and the possibility of reducing or eliminating MTA service to those municipalities served by the sixteen municipal bus lines that offer overlapping service to the service provided by the MTA.

The Special Master's orders are affirmed as to all other findings and determinations.

It is so ordered.

Date: September 23, 1999

/s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
Chief United States District Judge

United States District Court
Central District of California
Western Division

LABOR/COMMUNITY STRATEGY CENTER, *et al.*, Plaintiffs, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, *et al.*, Defendants.	)	CV 94-5936 TJH (MCx) **Order** (Filed Oct. 6, 1999)

The Court has considered Plaintiffs' *ex parte* application to stay the Court's order of September 23, 1999, together with the moving and opposing papers.

It is Ordered that the application be, and hereby is, **Denied**.

It is further Ordered, *sua sponte*, that lines 18-20 of page 4 of the September 23, 1999, order be, and hereby are, **Amended** as follows:

> . . . The MTA shall, by November 5, 1999, *contract* to obtain 248 buses on a temporary basis until the 248 purchased buses arrive. The 248 temporary buses shall be *placed into operation* no later than January 3, 2000.

Date: October 6, 1999

/s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
Chief United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

PROCEEDING BEFORE SPECIAL MASTER

LABOR/COMMUNITY STRATEGY CENTER, et al., Plaintiffs, vs. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY and JULIAN BURKE, Defendants.	CASE NO. CV 94-5936 TJH (MCx) **IN RE LOAD FACTOR COMPLIANCE**

MEMORANDUM DECISION AND ORDER

I. INTRODUCTION

The issue presented to the Special Master for resolution is fairly straightforward; what steps are necessary to bring the MTA into compliance with the load factor requirements of the Consent Decree? The resolution of this issue, however, is costly and complex. Under the Consent Decree entered into by the parties and approved by the Court on October 29, 1996, the MTA undertook to make significant service improvements to the bus system, including "reducing overcrowding by adding new service." *See* Consent Decree at II.A (hereinafter "Consent

Decree" or "Decree"). To accomplish this, the MTA agreed to a five-year timetable reducing the amount of overcrowding on buses as measured by a "load factor" – a specific ratio of bus passengers to bus seats. The achievement of this five-year [illegible] was to be accomplished in the following increments ("load factor target" or "LFT"):

December 31, 1997:	1.35
June 30, 2000:	1.25
June 30, 2002:	1.20

Thus, achieving the load factor of 1.35 would mean, *inter alia*, that during any 20-minute weekday peak period in the peak direction of travel on each bus line, the *average* number of passengers standing would not exceed 15. To meet the 1.25 load factor target, the average number of passengers standing during any 20-minute weekday peak period would not exceed 11 and to meet the final load factor target of 1.20, the average number of standing passengers during any 20-minute peak period would not exceed 9 passengers. *Id.*

If the MTA fails to meet the target load factors for all bus lines by the dates specified above, the Consent Decree provides that "MTA shall meet the target as soon as possible and reallocate sufficient funds from other programs to meet the next lower load factor target as scheduled." *See* Consent Decree at II.A.4 ("Failure to Meet Targets"). The Consent Decree requires that the MTA reprogram funds, which may include, but not be limited to, revenues from Propositions A and C discretionary funds, to meet the load factor targets. Any dispute about whether the targets are met or, if they are not

met, whether sufficient funds have been reprogrammed to meet the next target is to be reviewed by the Joint Working Group ("JWG"), established pursuant to Section IV of the Consent Decree, and consisting of representatives of the MTA and the Plaintiffs' class. If the JWG cannot resolve the matter, it will be referred to the Special Master. *See* Consent Decree at II.A.4.

On September 9, 1998, after having received guidance from the Special Master concerning the legal standards by which compliance is to be measured, the JWG agreed that the MTA did not meet the December 31, 1997 load factor target of 1.35 for 75 out of the 79 monitored bus lines. These bus lines had been selected for monitoring pursuant to a plan devised by the JWG and previously reviewed by the Special Master.

Since September 9, 1998, the JWG has met on a number of occasions to exchange information concerning the causes of the failure of the MTA to meet the load factor target and to consider the remedies that would be appropriate to bring the MTA into compliance with the load factor requirements of the Consent Decree. Through this process, an enormous amount of information and analysis has been generated which is part of the Administrative Record in this proceeding and provides the foundation for this decision. While the JWG was able to agree that the MTA had not met the target load factors, the JWG was not able to agree on an appropriate remedial plan. Therefore, each party prepared and presented to the Special Master a remedial plan providing its analysis of the causes of the MTA's failure to achieve the load factor targets and the proposed actions necessary to address those causes.

While there are some areas of agreement, the remedial plans presented by the MTA and the Plaintiff Class are far apart on a number of critical issues. Thus, pursuant to Section IV.A.4 of the Consent Decree, it is incumbent upon the Special Master to resolve the matter.

The specific task before the Special Master – and the purpose of this Memorandum Decision and Order – is to determine what remedial steps the Decree requires to achieve compliance with the 1.35 load factor target of December 31, 1997 "as soon as possible" and "to meet the next lower load factor target" of 1.25 by June 30, 2000. *See* Consent Decree at II.A.4.

In reaching a decision, I have reviewed the remedial plans submitted by the MTA and the Bus Riders Union ("BRU"), the briefs, reply briefs, declarations and exhibits submitted by counsel to the MTA and the BRU, and the Administrative and Supplemental Administrative Record jointly submitted by the parties. Having considered all of these data and analysis, I have adapted elements from each of the parties' plans in fashioning a "narrowly tailored" remedial plan that, in my best judgment, will meet the specific requirements of the Consent Decree. The specific elements of this remedial plan are set forth on pages 52-56 of this Memorandum Decision and Order.

Pursuant to Section V.B of the Consent Decree, any matter resolved by or referred to the Special Master may be reviewed by the United States District Court, Central District of California, Western Division, along with the recommendations of the Special Master, if any, upon motion by either of the parties. If either or both parties file such a motion, the entire Administrative Record,

including this Memorandum Decision and Order, will be submitted to the Honorable Terrence J. Hatter.

II. BACKGROUND

In September 1994, the Community Legal Strategy Center, together with the Bus Riders Union, other community organizations and the named Plaintiffs (hereinafter "Plaintiffs" or "BRU") brought a lawsuit against the MTA on behalf of the class of predominantly minority, transit-dependent bus riders in Los Angeles County seeking declaratory and injunctive relief under, *inter alia*, the Fourteenth Amendment and Section 6 of the Civil Rights Act of 1964. The Plaintiffs challenged the allegedly discriminatory and disparate impact of the MTA's decisions to increase bus fares, cut bus passes and divert funds from the bus system, which serves 94% of the transit-dependent riders of Los Angeles County, in order to finance and construct a subway and light rail system. After many months of discovery and within a few weeks of trial, the parties agreed to settle the litigation and a Consent Decree was approved by the Court on October 29, 1996.

A. Major Components of the Consent Decree.

1. Fare Provisions.

The Consent Decree contains three major components. First, the Decree provides for a freeze on fares until November 1998, with an allowance for inflationary increases thereafter. *See* Consent Decree at III. In addition, the Decree retains the monthly and bi-weekly passes

and creates a new weekly pass set at $11.00. These provisions were implemented with relatively little controversy and the objectives and benefits of the Consent Decree in this area have been for the most part successfully achieved. Moreover, although the MTA has been authorized to provide for an inflationary increase in the bus fares since November 1998, it has not done so and, apparently, has not initiated any of the formal steps required to do so.

2. Load Factor Reduction Program.

The second major component of the Consent Decree – a program for the reduction of bus overcrowding as measured by load factor targets – has not fared so well. As stated above, the Decree requires the MTA to provide for significant improvements in bus service, to be measured by the achievement of specific load factor reduction targets over a five-year period. The MTA's failure to achieve the load factor target established by the Decree is what necessitates the present Decision. The pertinent history is as follows.

On May 1, 1998, the Plaintiffs filed a motion with the Special Master seeking to consolidate the informal Stage I and formal Stage II proceedings and proceed directly to a determination of whether the MTA was in compliance with the Consent Decree and, if not, what remedy would be appropriate. The MTA opposed the motion, proposing informal consultations.

On May 28, 1998. the Special Master issued a Procedural Order granting the Plaintiffs' motion to consolidate Stage I and Stage II proceedings and requesting that the parties clarify the outstanding issues to be resolved. In their written submissions to the Special Master and at a June 24 status conference, it was apparent that the parties held substantially different views as to how Section II of the Consent Decree should be interpreted and applied, and that these foundational conflicts needed to be resolved as a threshold matter before the issue of compliance could be determined. Accordingly, the parties were directed to brief the foundational legal question (and various related sub-issues) concerning the proper standard by which to measure compliance with Section II of the Consent Decree.

In its brief, the MTA contended that compliance under the Decree should be measured by a comparison of the MTA's overall system-wide load factor compliance rate, per time period, with the industry-wide percentage of service interruptions. In connection with this interpretative proposal, the MTA argued that the load factor should be computed using fixed, 20-minute periods. Conversely, the Plaintiffs argued that the Consent Decree requires compliance to be measured on each and every bus route, using a sliding window for "any 20 minute period." Plaintiffs further argued that the MTA had breached the Consent Decree by failing to procure an additional 102 buses, as required by Section II.B. Opening Brief of Plaintiffs and Plaintiff's Class (filed July 8, 1998); MTA's Brief Re Load Factor Compliance Standard (filed July 8, 1988).

The Special Master issued a Memorandum Decision and Order on July 15, 1998, rejecting the MTA's system-wide interpretation of Section II of the Consent Decree and, instead, holding that Section II of the Decree requires that the load factor targets be met on each and every bus line. The Special Master adopted the MTA's position on the "20-minute" measure and also noted that there may be *de minimis* exceptions to requirements that the MTA meet the LFT on every bus line for every 20-minute period. Memorandum Decision and Order (filed July 15, 1998).

On August 14, 1998, the Plaintiffs moved for reconsideration of the Special Master's decision on the issues relating to the 20-minute period, by-passed passengers, *de minimis* exceptions, and the procurement of an additional 102 buses. Plaintiff's Motion for Reconsideration of the Special Master's Memorandum Decision, and Motion to Strike Inadmissible Extrinsic Evidence (filed Aug. 14, 1998).

Upon completion of the briefing, the Special Master issued an Order on August 25, 1998, granting the Plaintiffs' motion in part and denying the motion in part. Order Re Plaintiffs' Motion for Reconsideration of the Special Master (dated July 15, 1998); Order Re Compliance Standards (dated Aug. 25, 1998). The Special Master adopted the Plaintiffs' definition of "any non-overlapping sliding 20-minute period" as the proper measurement of compliance and deferred consideration of *de minimis* exceptions until a later stage in the proceeding. On the issue of the additional 102 buses, the Special Master reaffirmed his earlier decision that Section II.B of the

Consent Decree did not mandate the immediate procurement of 102 additional new buses by July 1997.[1] The Special Master deferred consideration of when the additional new buses must be acquired until the remedial phase of the load factor compliance proceeding.

Having clarified the legal standards applicable to compliance under the Decree, the Special Master directed the JWG to reconvene to determine whether the MTA was in compliance with the load factor targets for each bus line and, if not, to consider appropriate remedies. On September 8 and 9, 1998, the JWG found that the MTA was not in compliance with the 1.35 LFT for 75 out of the 79 monitored MTA bus lines. Letter to Special Master from Habib F. Balian (dated September 8, 1998); Letter to Special Master from Eric Mann (dated Sept. 9, 1998).

While valuable information and analysis were developed and exchanged by the parties, and although a number of discussions on proposed remedial actions were held, the JWG failed to reach agreement on a remedial plan. Despite this impasse, the parties requested the opportunity to establish confidential procedures for the purpose of developing and exchanging proposed remedial plans in the hope of facilitating settlement and agreement on areas of difference.

The proposed plans were exchanged on December 11, 1998 and discussed in an informal conference held in Los Angeles on December 18, 1998. At the conclusion of the

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[1] The MTA temporarily satisfied this requirement by extending the life of buses scheduled for replacement and used the replacement vehicles to add service.

informal discussions, the Plaintiffs indicated to the Special Master that there was no prospect of reaching an agreement on the remedial plan and requested additional discovery concerning the basis for the MTA's proposed remedial plan. The Special Master approved the parties' proposed procedures for additional, limited discovery and granted their request for a postponement of a briefing schedule on the merits. Procedural Order (dated Dec. 16, 1998). Briefing on the merits of the proposed remedial plans was completed on February 13, 1999, and the issue of a remedial plan was thus referred to the Special Master for decision.

3. Development of a Five-Year Plan.

The third major component of the Consent Decree involves the development of a five-year plan, as set forth in Section II.C.2, providing for additional bus and other transit services designed to improve access to employment opportunities, health care facilities and educational centers for the transit-dependent. To this end, the Decree requires the MTA to implement, after consultation with the JWG, a pilot project to demonstrate the feasibility of providing added service to achieve this objective. The JWG failed to reach agreement on a five-year plan by the deadline of December 31, 1998. At the direction of the Special Master, the parties submitted separate five-year plans on February 21, 1999. As the MTA notes in its Opening Brief, compliance with this provision of the Consent Decree may require the MTA to acquire additional buses to implement the five-year plan.

B. Role of the Joint Working Group.

At the time the Consent Decree was agreed upon by the parties and approved by the Court, it was impossible to fashion in great detail all of the specific actions that would be necessary to achieve the goals, objectives and spirit of the Decree. Accordingly, the JWG, consisting of representatives of both the MTA and the Plaintiffs, was established for the purpose of working together to fill in the details and realize the benefits of the Consent Decree for the transit-dependent population – a goal shared by the Plaintiffs and the MTA. The JWG has met on many occasions and in many ways has been a thoughtful forum for the exchange of information and ideas. Despite the controversies that have flared up, the JWG has developed a substantial amount of valuable information that has been used to improve the quality of bus service.

It has been disappointing, however, that the JWG has not been able to resolve many of the major issues in dispute. This is unfortunate because it requires the Special Master to step in and substitute his judgment for the expertise of the MTA staff, the BRU staff and their expert consultants, who are very knowledgeable about the bus system and are capable of designing solutions to problems arising under the Consent Decree. Nonetheless, all the MTA's "horses" and all the BRU's "men" (and women) have not been able to put together an agreed-upon remedial plan, which was clearly the desired course under the Consent Decree. Consequently, the obligation to resolve these areas of conflict under the Decree is now thrust upon, at least in the first instance, the Special Master.

If it has taken more time than we all would have wished to get to this point, it is because I strongly believe that it is important that the JWG be given every incentive and opportunity to resolve as many of the disputes as possible. Moreover, the data and analysis that have resulted from these deliberations have been a critical part of the analytical foundation for a remedial plan that meets the Consent Decree's requirements. Most importantly, the parties have not merely passed the time collecting and reviewing information; rather, they have taken a number of critical and concrete steps to improve the MTA's capacity to adhere to the requirements of the Consent Decree. For example, in January 1998, construction of the Eastside, Mid-Cities and Pasadena rail lines was suspended, thus conserving some transit capital and management resources for bus improvements.[2] In October, an accelerated bus procurement plan was approved that commits the MTA to purchase 2095 buses at a cost of $817.3 million and will reduce the average age of the fleet to about six years within the next two and one-half years. Purchase orders have been executed for 538 new buses to be delivered before June 2000 and plans have been approved to convert or repair 917 "unreliable" alternate fuel buses by the end of the year.

In sum, both parties have undertaken an extraordinary amount of work to develop the analytical foundation

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[2] Plaintiffs contend that the MTA has not actually reallocated any of these resources to improve the bus system and plans to provide substantial resources to the Pasadena Blue Line. Reply Brief for Plaintiffs and the Plaintiff Class at 2 n.2 (Filed Feb. 16, 1999) ("BRU Rep. Br.").

for a remedial plan that addresses the causes of bus overcrowding. Because the parties have failed to reach agreement, however, it is now incumbent upon the Special Master to determine what specific steps are needed to achieve compliance with the dictates of the Consent Decree.

III. POSITIONS OF THE PARTIES ON THE PROPOSED LOAD FACTOR REMEDIAL PLANS

For the most part, the information relied upon by the parties in the preparation of their remedial plans has been developed by the MTA and the BRU through the cooperative efforts of the JWG. Thus, there exists a common source of data that both parties generally accept. Both parties have undertaken a thoughtful analysis of these data and, while they agree on certain points, they have reached widely different conclusions on the causes of, and remedies for, the MTA's load factor noncompliance.

Significantly, both parties agree that approximately half of the incidents of load factor exceedence are attributable to "missing buses" – buses that are in the active fleet and scheduled for service, but are unable to provide service on a particular run because they are not operable, the driver is not available, or the bus experiences in-service failure. The parties also agree that most of the load factor exceedence attributable to missing buses is a result of the poor reliability of an aging bus fleet and a fleet which has experienced substantial mechanical difficulties with the use of alternative fuel vehicles. MTA's Opening Brief Re Load Factor Reduction Plan at 5-6 (filed

Feb. 8, 1999) ("MTA Br."); Bus Riders Union Remedial Plan for Meeting Load Factor Requirements of Federal Consent Decree at 3-4 (filed Dec. 11, 1998) ("BRU Remedial Plan").

The parties disagree, however, on the other 50% of the causes of load factor exceedence. The MTA believes that 29% of these LFT exceedences are attributable to poor schedule adherence – the fact that a bus arrives early or late and therefore creates overcrowding situations that a properly managed schedule would avoid. The MTA believes that the remaining 19% is attributable to an insufficient number of buses on the routes. The BRU, on the other hand, believes that 50% to 60% of the causes of overcrowding is attributable to insufficient capacity and that poor schedule adherence is negligible as a cause of overcrowding. Chart A provides a comparison of the causes of overcrowding as analyzed by the MTA and Plaintiffs.

Since the MTA and the Plaintiffs disagree about at least half the universe of load factor exceedence, it is perhaps not surprising that they also differ considerably on the remedies that are needed to address these causes. Charts B and C provide a comparison of these proposed remedies. The following subsections summarize the respective positions of the parties, which are set forth more completely in their briefs and proposed plans.

A. The MTA's Causal Analysis and Proposed Remedial Plan

In order to determine the causes of its load factor exceedences, the MTA has undertaken an analysis of

point check data compiled during 1998 on the 20 highest ridership bus lines and reviewed historical reports on cancelled daily bus runs and service delays. MTA Br. at 3.[3] The MTA staff used these data to prepare spreadsheets detailing each instance of overcrowding as a basis for analysis of the primary cause of each instance of overcrowding. The MTA concluded that of the 1,369 instances of overcrowding observed in 1,424 point checks, missing trips accounted for more than one-half of all occurrences (51.7%). *Id.* at 5. Poor schedule adherence was found to be the primary cause of 29.1% of the observed overcrowding. *Id.* Insufficient capacity (*i.e.*, not enough buses) was the primary cause of the remaining 19.2% of all instances where the LFT was exceeded. *Id.* The MTA's remedial plan is designed to allocate resources to address these causes of overcrowding proportionately.

1. Missed trips.

As noted above, the MTA attributes 51.7% of instances of overcrowding to "missed trips." Under the MTA's analysis, "missed trips" include: (1) trips that were scheduled but missed because the bus was not able to provide service for any number of reasons; (2) trips that were missed due to the unavailability of an operator; and (3) trips that were missed due to an incident occurring while the bus was in service (*e.g.*, "in service failure"). MTA Br. at 5-6. "In service failures" include mechanical

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[3] Trained MTA and BRU personnel conduct "point checks" by counting the number of bus passengers standing when a bus arrives at a designated bus stop.

breakdowns, accidents, passenger incidents, traffic delays, and other events that can cause a scheduled bus not to complete its assigned route.

The MTA points out that in its continued effort to improve air quality in Southern California – an issue of enormous concern in the Los Angeles basin – it has acquired alternative fuel buses that do not have the demonstrated record of reliability that more traditional diesel-powered buses have developed over the years. *Id.* at 6. The MTA notes the following problems with its alternate fuel buses that have substantially decreased the reliability of its peak fleet: (1) some 300 buses, most of them alcohol-fueled, are not currently in use due to engine failure, (2) 594 compressed natural gas (CNG) buses have exhibited substantial reliability problems, and (3) due to the problems encountered with the reliability of new alternate fuel buses, the MTA has retained some 910 buses in the fleet that exceed the 12-year age for planned retirement. *Id.* The MTA's plan addresses the first sub-category of missed trips, the unavailability of equipment, by improving the availability of buses through warranty defect corrections, engine replacements, improved maintenance, and the acquisition of more modern, reliable equipment. The MTA proposes the following specific steps to address the missed trips cause of load factor exceedence that is attributable to the lack of an operable bus. *See Id.* at 7-14.

(a) Accelerated replacement plan.

The MTA Board of Directors has recently adopted an accelerated bus procurement plan to provide for 1,237

new buses over the next three fiscal years (through FY02). MTA Br. at 7. One-half of these buses will be delivered within the next 18 to 24 months. *Id.* The MTA's replacement schedule for fiscal year 1998 through fiscal year 2004 provides for the accelerated procurement of 2,095 buses, which constitute 782 buses over and above what had initially been planned for this period at the time the Consent Decree was approved. *Id.* at 8.[4] The additional cost is almost $300 million. *Id.* This accelerated program is intended to improve the condition of MTA's fleet and thereby reduce the number of missed trips due to the lack of operable equipment. It also is intended to reduce the number of missed trips due to service failures or bus breakdowns.

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[4] In December 1998, MTA completed a contract with Neoplan for the acquisition of 100 high-floor CNG buses. The delivery of these buses is scheduled to begin in March 1999. *Id.* at 8. In October 1997 the MTA entered into a contract with New Flyer for the acquisition of 223 high-floor CNG buses. *Id.* These buses are expected to be delivered starting in July 1999. *Id.* In October 1998, the MTA entered into a contract with NABI for the acquisition of 215 low-floor CNG buses, and delivery for these buses is scheduled to begin in December 1999. *Id.* The acquisition of these 538 buses, which are expected by June 2000, will decrease the average age of the MTA fleet from nine and one-half years to approximately six years. *Id.* In addition, in August 1998, the MTA purchased 20 New Flyer low-floor buses from ATC/Vancom of Las Vegas. *Id.* at 10. These buses were put into service on November 11, 1998. *Id.*

(b) Conversion of ethanol buses.

The MTA contends that an additional cause of "missed trips" can be attributed to the extreme unreliability of the approximately 333 ethanol buses, which the MTA purchased between 1989 and 1^92. MTA Br. at 9. The MTA asserts that, in the later years of operation, alcohol engines have failed at an average of 30,000 miles compared to 120,000 miles between failures for comparable diesel engines. *Id.* To remedy these problems, the MTA has begun to convert the ethanol buses to diesel at the rate of 15 buses per month, and plans to complete the conversion program by December, 1999. *Id.* The MTA has found that the buses converted to diesel so far have demonstrated significant improvement in their performance. *Id.*

(c) Correction of warranty defects in CNG buses.

According to the MTA's analysis, correction of warranty defects will also serve to address the problem of "missed trips." MTA Br. at 10. The CNG fleet of buses has experienced fuel tank failures, bus fires, and problems with a variety of engine and fuel-system-related components. *Id.* The MTA has worked with the manufacturer to develop protection shields for installation under the fuel tanks and heat wraps to protect the buses from catching on fire should the exhaust system malfunction. *Id.* The bus manufacturer is expected to complete retrofit work on the buses to improve their reliability and performance. *Id.*

(d) Better management of operator availability and hiring.

The MTA has found that the lack of an operator (bus driver) accounted for about 7% of the missed trips occurring between January to August 1998. MTA Br. at 11. The MTA believes that this problem is not caused by an insufficient number of operators, but by the need for better management of the available operators. *Id.* To address these concerns, the MTA recommends various management steps including ensuring that operators not take vacations at the same time and that the right number of operators are assigned to each shift at each division. Instead of hiring more operators, the MTA recommends varying the rate of hiring to match seasonal trends in the need for operators. *Id.*

(e) Reduction of in-service failures.

The MTA has also concluded that accelerated replacement and improved reliability of alternate fuel buses will reduce the number of missed trips caused by in-service failures. *Id.* at 12. The MTA proposes to test a "staged" buses program, increase maintenance staffing, and provide for additional training of maintenance personnel. MTA Br. at 12-13. Under the "staged" buses program, up to ten buses will be stationed on call at five locations during peak hours. *Id.* at 12. The MTA believes that this will enable it to respond quickly to service disruptions and to reduce the amount of time lost between the trouble call, loss of service, and replacement. The MTA plans to test and evaluate this program in 1999. *Id.* at 11.

In addition, since July 1998, the MTA has hired up to 53 additional mechanics, which has resulted in improvements in the ratio of past-due, critical preventive maintenance program repairs and an increase in the miles between total road calls ("MBR"). *Id.* at 13-14. The MTA has set an objective to increase the MBR from 700 in July 1998, to 2000 by June 2000. *Id.* at 14. The MTA notes that the Cancellations and "Out Lates" of buses were reduced to less than 1% by November 1998 compared with over 3-1/2% in August 1998. *Id.* According to the MTA, these improvements are a direct result of increased emphasis on maintenance issues. The MTA contends that it now has a sufficient number of mechanics to achieve these goals. *Id.* The MTA also plans to improve training for mechanics. *Id.*

(f) Other actions.

The MTA's remedial plan includes other actions to reduce overcrowding. These include training for bus operators to improve consistency of actions and deployment of Operations Supervisors at recurring problem sites. MTA Br. at 15. In addition, the MTA plans to procure and install automated passenger counters (APCs) on 20% of the fleet to provide more reliable tracking on overcrowding and will initiate a pilot project to utilize TRS for vehicle tracking and remote supervision, which will allow the MTA to provide faster in-service control and to make adjustments in real time. *Id.*

2. Schedule Adherence

The MTA's causal analysis and remedial plan are premised on the assumption that proper management of schedule adherence is crucial to the even distribution of passenger loads throughout the day. In theory, a bus running early increases the likelihood that the next bus will be forced to pick up a substantially greater load of passengers, and buses departing excessively late also cause overcrowding. MTA Br. at 15. The MTA's analysis concludes that 29.1% of the instances of overcrowding are due to poor schedule adherence by MTA operators.[5] *Id.* at 16.

To improve schedule adherence, the MTA recommends several steps. First, the MTA suggests the deployment of additional on-street supervisors to force operators who "run hot" (*i.e.*, run ahead of schedule) to adhere to the schedule.[6] *Id.* Second, the MTA intends to enforce more strictly its collective bargaining agreement

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[5] MTA's data reveal that early arrivals were found to cause 18% of such occurrences while excessive lateness was the cause of the remaining 11%. *Id.* at 16.

[6] The MTA has tested this approach over a two week period on Line 33 which runs from downtown Los Angeles, via Venice Boulevard, to the City of Santa Monica, a line that has experienced an usually [sic] high number of instances of overcrowding attributable to poor schedule adherence. According to the MTA, there was a 31% decline in the number of load factor violations, from 42% to 29%, as a result of improved schedule adherence during the demonstration period. *Id.* at 17 and Woodbury Decl. ¶¶ 16, 17. *See also* BRU Op. Br. at 22-23; MTA Rp. Br. at 5.

by taking disciplinary action against operations personnel for rule violations that impact on-time performance. *Id.* The MTA also recommends making use of automated passenger counters and radio system monitoring techniques for better identification of problem routes, runs and operators. *Id.* at 17. Finally, the MTA plans to delegate additional responsibilities to the Transportation Division Dispatchers to enable the reduced number of Transit Operations Supervisors to focus on schedule adherence. *Id.* at 18. The MTA cites the successes of the San Diego and Minneapolis transit systems as evidence that on-site supervision can improve schedule adherence. *Id.* at 17-18.

3. Insufficient Scheduled Service

The MTA also concludes, based on its analysis, that 19.2% of the instances of overcrowding are due to insufficient scheduled service. MTA Br. at 19. To address this problem, the MTA proposes to add 30 buses to the peak fleet. *Id.* Moreover, to meet the load factor targets of 1.25 by June 2000, the MTA proposes adding, no later than December 1999, 130 additional buses to the peak fleet (over and above the 30 buses mentioned above). *Id.* at 19-20.

In designing a remedy for this factor, the MTA has submitted an analysis of the 20 most overcrowded lines conducted by various MTA personnel responsible for designing bus schedules ("Schedule Makers"). This analysis includes recommendations on how to address the specific causes of overcrowding for each of the lines,

utilizing various schedule adjustments such as short-lining, adjusting headways, deadheading, interlining, and re-tieing. *Id.* at 20-21. The analysis by the MTA's Schedule Makers also includes recommendations on how many additional buses would be required to meet both the 1.35 and 1.25 load factor targets. Based on the analysis of these Schedule Makers, the MTA concluded that 160 additional buses would be required to ensure compliance with the Decree. *Id.* at 46.

B. BRU's Casual [sic] Analysis and Remedial Plan

Taking into account both the MTA and the BRU point check data, the BRU has conducted a violation by violation analysis of the peak hours, between January and September 1998, on the 75 lines that the MTA and the BRU agreed were in violation of the Consent Decree. *See* Mapping of Load Factor Violations, Weekday A.M. and P.M. Rush Hours (75 Lines (dated Dec. 11, 1998) (Administrative Record ("AR") Tab 59 ("BRU Analysis")). In this analysis, every violation was matched to its schedule to determine if all the scheduled buses arrived, and, if so, what time they arrived and how many people were on the buses. From this analysis, Plaintiffs concluded that there were two primary sources of load factor violations: (1) scheduled buses not arriving at all (40%-50%), and (2) not enough buses even when all the scheduled service arrived (50%-60%). *See* BRU Remedial Plan at 3-4. The BRU attempted to code every violation on every line according to these two primary causes. In conducting its mapping analysis, the BRU relied on MTA and BRU data showing the full extent of the MTA's historical noncompliance recorded from January 1, 1998 and then analyzed

these data using the 20-minute sliding-window periods. In tailoring a remedial plan to cure the massive violations, the BRU addressed both the violations caused by missing buses and the violations caused by insufficient capacity. *Id.*

1. Remedies for Missing Bus Violations

The BRU's plan to remedy the approximately 50% of load factor violations caused by missed trips aims to improve the reliability of the operating fleet through modernization and engine replacement and by hiring additional operators and mechanics. The specific proposals include requiring the MTA to:

- Purchase 333 new CNG buses over and above the MTA's accelerated procurement plan to provide for the replacement of all buses over the federal 12-year/500,000-mile retirement standard by the June 2000 load factor target.
- Replace engines in methanol/ethanol fleet.
- Complete CNG warranty program.
- Hire 112 operators to increase the operator spare ratio to 1.20.
- Hire 64 mechanics to expand preventative, critical and general maintenance.
- Expand maintenance training and supervision.
- Create/expand recurring defects analysis program.
- Improve spare parts management.

- Improve management of emergency service for bus accidents, advance notice of special events, traffic management, and radio system.

BRU Remedial Plan at 5-6.

2. Remedies for Insufficient Capacity.

The BRU's remedial plan addresses the serious problem of insufficient capacity by first analyzing how many additional bus trips are needed to achieve the load factor targets for each bus line. *Id.* at 6-8. The BRU's analysis concludes that additional service is required on 57 lines to meet the 1.35 and 1.25 LFTs. *Id.* at 6. To provide this level of service, the BRU recommend the immediate purchase of 348 additional buses (plus 70 spares) to meet the 1.35 target, and 157 additional buses (plus 31 spares) to meet the 1.25 target. Reducing this total of 606 buses by the 53 buses that MTA already has planned for expansion, the BRU recommends that the MTA expand its fleet by procuring 553 new CNG buses. Opening Brief for Plaintiffs and the Plaintiffs Class at 33 (Filed Feb. 8, 1999) ("BRU Br."). The BRU also recommends increasing the Operator Availability Ration ("OAR") from 1.16 to 1.20 and hiring 184 additional mechanics. BRU Remedial Plan at 7, 5.

Additionally, because the bus procurement process generally takes 18 months, the BRU's plan would require the MTA to lease immediately 348 new CNG buses to meet the 1.35 target until the purchased buses arrive. BRU Br. at 33.

Finally, Plaintiffs contend that Section II.B of the Consent Decree requires the MTA to add into service 102

additional buses (*i.e.*, buses in addition to those already planned for replacement purposes). *Id.* at 36.

3. Monitoring and Reporting.

The BRU points out that the MTA has reduced its point check/ride check staff from approximately 60 to 29. BRU Remedial Plan at 7. The BRU recommends that the MTA continue the frequency of checks at two times a month on the top 20 lines and increase the frequency of point checks to two times a month on the rest of the 55 lines. *Id.*

In addition, in order to monitor overcrowding more effectively, the BRU proposes that the MTA prepare a quarterly report that tracks all remedial action, per line and system-wide, including:

(a) Cancelled and late runs totaled for each month;

(b) Equipment failures in-service listed by amount, reason, bus series and line;

(c) Missing operators summarized by reason per month;

(d) Point check data matched to scheduled times and bus runs, with analysis of every violation; and,

(e) A mapping of every load factor violation for each line over time.

Id. at 7-8.

IV. ANALYSIS OF ISSUES AND FINDINGS.

A. Causes of Load Factor Violations.

1. Load Factor Data.

Under the Consent Decree, a violation occurs when the *average* load factor on any bus line during any sliding 20-minute (non-overlapping) period during the peak morning or evening rush hours exceeds the load factor target. *See* Order Re Plaintiffs' Motion for Reconsideration (filed Aug. 25, 1998). The fact that a particular bus or several buses carry more than 15 standing passengers and thus exceed the 1.35 ceiling will not result in a violation unless the *average* load factor for a non-overlapping 20-minute rolling period exceeds 1.35. Furthermore, it is important to keep in mind that the determination of load factor exceedence is based on MTA and BRU point check data that monitored only a sample of the number of bus trips from November 1997 through September 1998. Consequently, the "violations" are only representative of the extent of overcrowding. Nevertheless, the general consistency of BRU and MTA data generally establish the validity of the sampling size.

In the analysis supporting its remedial plan, the BRU relied upon incidents of exceedence during the entire period from November 1997 through September 1998 and utilized, properly, the sliding 20-minute window. The BRU also provides the data for all 77 lines. *See* BRU Analysis. The MTA, on the other hand, apparently conducted its analysis using a static 20-minute window, limited the incidents of violation to more recent occurrences, and focused on the 20 most heavily traveled lines. *See* MTA Br. at 20; *see also* Deposition of Frank Schroder at

79:17 – 80:6 (dated Jan. 13, 1999). Therefore, the data concerning line by line violations relied upon by the BRU in fashioning its remedial plan are more comprehensive and useful in analyzing the causes of load factor exceedence. This is not to say that the conclusions that the BRU draws from its analysis of these data are always correct. However, the BRU's data provide a more comprehensive picture from which to determine line-by-line causes of load factor violations and serves as a basis for tailoring appropriate remedies to the problem of overcrowding.

2. Causes of Overcrowding.

The parties generally agree that about half of the incidents of overcrowding are attributable to missed trips resulting from the unavailability of a bus, the unavailability of an operator or in-service failure. MTA Br. at 3-5; BRU Remedial Plan at 3-4; *see also* Declaration of Dana Woodbury ¶ 8 (dated Feb. 8, 1999) ("Woodbury Decl.").

They differ sharply on the other half. The MTA found that 29% of overcrowding was caused by poor schedule adherence and that only 19% was a result of insufficient capacity. MTA Br. at 5; Woodbury Declaration ¶¶ 8-9. The BRU, on the other hand, found that 50%-60% of the load factor violations were caused by insufficient capacity and accorded negligible weight to poor schedule adherence as a cause of overcrowding. BRU Remedial Plan at 4.

The gap between the parties on this issue, however, may not be as large as it seems. The MTA acknowledges that improved management of schedule adherence cannot eliminate 29% of the load factor violations and that it is

very difficult to reduce late arrivals through schedule management alone. *See, e.g.*, Woodbury Decl. ¶ 28 (schedule adherence can only remedy one out of six violations). Moreover, the BRU does not deny that improvements in schedule adherence, especially in combination with other factors such as added capacity, will reduce instances of overcrowding. See Declaration of Thomas Rubin ¶ 42 (dated August 14, 1998) ("Rubin Decl.").

As discussed more fully below, a combination of remedies, including accelerated replacement, fleet expansion and better schedule adherence, are necessary to meet the LFTs. While I believe that the MTA overstates, and the BRU understates, the extent of poor schedule adherence as a cause of overcrowding, I do not believe that it is necessary to allocate a specific causal percentage to schedule adherence to design an interactive remedial plan.

B. Remedy for "Missing Buses".

The MTA and the BRU agree that most of the violations attributable to missing buses can be cured by substantially improving the reliability of the fleet. BRU Remedial Plan at 5; MTA Br. at 7. They further agree that the conversion of the ethanol buses and warranty repair of the CNG buses are important to improved reliability. BRU Remedial Plan at 5; MTA Br. at 9-10. Finally, they agree that reliability can be enhanced by the retirement and replacement of older, less reliable diesel buses on the fleet. BRU Remedial Plan at 5; MTA Br. at 7-8.

BRU bases its proposed remedy on the fact that under the MTA's accelerated procurement plan there will

be 599 buses over the 12-year/500,000-mile retirement limit in June 2000, the date by which the 1.25 load factor target must be achieved. BRU Remedial Plan at 5. After the conversion of the ethanol/methanol fleet, the MTA will still have 333 buses over the 12-year/500,000-mile mark. Thus, the BRU proposes the immediate procurement of 333 buses for delivery prior to June 2000. *Id.*

It is beyond question that the MTA's active fleet has become older in recent years. The size of the MTA bus fleet has steadily declined from FY93 through FY97 while, at the same time, the age of the fleet has steadily increased during the same period. *See* Mundle & Associates, Review of CACMTA's Bus Operating Plans at V-2 (dated Mar. 1998) (AR Tab 77). The percentage of buses that exceeded 12 years of age in June 1997 had increased to 45%. *Id.* at Exh. V-5. Excluding the methanol buses from the age calculations (which have had significant unreliability problems), the percentage of the fleet that exceeded 12 years in June 1997 was 52%. *Id.* at Exh. V-6.

Nor is there any dispute that the continued use of older buses has led to increasingly frequent and expensive maintenance and has increased the number and severity of breakdowns. As of July 27, 1997, the MTA had a total of 2,416 buses, of which 2,103 were in the active fleet and only 1,666 were operational. *Id.* at V-2.[7] According to MTA's statistics, there were 333 cancelled runs in FY94 compared to 7,093 in FY98. *See* MTA Cancelled and Late Runs FY93 Through FY98. AR Tab 84. In addition,

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[7] The total fleet included buses that were leased by private contractors and buses that were retired from service.

there were 3,681 late runs in FY 94 compared to 15,079 in FY98. BRU Br. at 10.

To address the problems associated with a rapidly aging fleet, the MTA Board approved an accelerated bus replacement schedule in October 1998. In his declaration, Mr. John Drayton, MTA's Acting Director for Vehicle Acquisition, Technical Support, Warranty and Reliability, points out that as a result of this accelerated bus procurement plan, the MTA will be receiving over 1,237 new buses over the next three fiscal years (through FY02). Declaration of John Drayton ¶ 4 (dated Feb. 8, 1999) ("Drayton Decl."). One half of these buses will be delivered within the next 18-24 months. *Id.* ¶ 5. At the time the Consent Decree was entered in October 1996, the MTA's replacement schedule for Fiscal Year 1998 through Fiscal Year 2004 was 1,313 buses. As a result of the accelerated procurement plan, the MTA's replacement schedule will provide 2,095 buses over the same period of time. This represents a procurement of 782 buses over and above what had initially been contemplated for this period, at an additional cost of almost $300 million. *Id.*

The BRU points out, however, that most of these replacement vehicles will not arrive by June 2000 in time to meet the 1.25 LFT. BRU Br. at 19-20. In fact, under the accelerated plan, there will actually be a decrease by 26 buses from the number of buses previously scheduled to arrive in this fiscal year (FY99) and a net increase of only 203 buses in FY99 and FY00, which will be delivered by June 2000. *Id.* Section II of the Decree requires the Special Master to design a remedy that will meet the 1.35 load factor target "as soon as possible" and the 1.25 target by June 2000. The accelerated arrival of buses after June 2000

undoubtedly will prove necessary to meet and maintain subsequent reduced load factor targets, but this is not a remedy for the violations which have already occurred.

Nevertheless, the MTA has set in motion a number of specific steps that will have a measurable effect on meeting the June 2000 LFTs. MTA Br. at 7-10. First, the MTA currently has contracts for the acquisition of 538 buses, expected to be delivered by June 2000, which will decrease the average age of the MTA fleet from 9-1/2 years to approximately 6 years. *Id.* at 8. Second, the MTA will complete the conversion of 333 ethanol buses, which have been extremely unreliable, into diesel buses by December 1999. *Id.* at 9. Third, the MTA will complete the repair of defects pursuant to warranty on 594 new CNG buses by May 1999. *Id.* at 10. Finally, the MTA purchased 20 low floor buses from Las Vegas which were placed in service on November 11, 1998 after corrective repairs were completed. *Id.*

It is evidence that the MTA's accelerated bus procurement program, approved by the Board last October, is a critical step that is fully consistent with the objectives and spirit of the Consent Decree. The evidence supports the conclusion that this accelerated program will improve the condition of the MTA's fleet by reducing the number of missed trips caused by the lack of operable equipment and service failures. I am persuaded that the combination of these new, converted and repaired buses, which total 1,485, will substantially improve the reliability of the fleet prior to the June 2000 load factor target. Moreover, the replacement program is consistent with the practical reality of efficient procurement planning and bus deliveries. The accelerated procurement schedule will stagger the

delivery of buses. As Mr. Drayton points out, it is impractical to replace a bus fleet all at once due to the physical constraints of receiving a large number of buses all at one time as well as the problems that are created when an entire fleet gets old and must be replaced at the same time. Drayton Decl. ¶ 4.

In my view, the BRU has underestimated the extent to which the elimination of many of the most unreliable buses from the fleet and their replacement with 1,485 new, converted and repaired buses before June 2000 will substantially improve the reliability of the MTA's active bus fleet and therefore reduce significantly the number of incidents of overcrowding that are attributable to missing buses. Moreover, the evidence suggests that the MTA's accelerated bus procurement program will contribute to significant improvement in overall fleet reliability. From FY98 through June 2000, the MTA plans to obtain 895 new buses, 240 more replacement buses than scheduled under the previous plan. If executed on time, the average age of the fleet will be reduced from 9.73 in FY99 to 7.66 by June 2000. 1998 Bus Procurement Plan and Summary Age of Fleet at 2 (AR Tab 66). While a vehicle that has reached the 12-year/500,000-mile threshold is eligible for replacement with federal assistance, it is not absolutely essential that no bus be allowed to operate beyond this threshold. Indeed, some of the older buses in the MTA's fleet have been more reliable than some of the newer alternative fuel vehicles.

While the BRU's goal of retiring *all* buses exceeding this threshold by June 2000 is laudable, I am not persuaded that this further step is necessary to eliminate the load factor violations attributable to inoperable buses or

in-service breakdowns. With the delivery of 437 replacement buses in FY00 – the highest annual level in the accelerated plan – the MTA should be able to retire vehicles with a history of mechanical problems. *Id.* at 1. With operating spares, the MTA should have a far more reliable fleet.

For these reasons, I have concluded that it is not necessary to direct the MTA to purchase immediately the additional 333 new CNG buses to address the "missing bus" cause of load factor exceedence. I find that the MTA's engine conversion and warranty repair program, together with the accelerated bus replacement plan, should be sufficient to remedy the violations caused by inoperable buses. Since additional buses will be required to address the "insufficient capacity" cause of load factor exceedence, *see* Section IV.F below, there are limits as to how many new buses the MTA can procure and assimilate in one fiscal year, and, in my judgment, the immediate need for additional capacity is more critical at this point in meeting the LFTs. However, should the MTA modify or scale back its accelerated bus replacement plan or fail to make timely conversions or warranty repairs to alternate fuel vehicles, additional measures may be required at that time.

C. Operator Availability.

The BRU also contends that the current operator assignment ration (OAR) of 1.16 is inadequate to ensure a cushion of reserve operators to cover for illness, military leave, court duties, discipline and other events that prevent operators from being available to work. Although

the MTA notes that the lack of operator availability accounted for 7% of the missed trips that occurred between January and August 1998, it rejects the BRU's proposal to solve this problem by increasing the OAR from 1.16 to 1.20, which would require approximately 112 new bus operators at an annual increased cost of $6 million. *See* Declaration of Gary Spivack ¶¶ 11-13 ("Spivack Decl.").[8] Instead, the MTA plans to improve the management of available operators by ensuring that the right number is assigned to each shift, coordinating vacations, and studying how to establish specific OAR levels for each division.[9] *Id.* at ¶ 12.

In my view, the record does not justify a mandatory increase of the OAR at this time. Nonetheless, the MTA needs to take whatever steps are necessary to comply with the requirements of the Decree by substantially eliminating the number of missed trips attributable to operator unavailability. If this objective is not achieved by the end of December 1999, through the management reforms proposed in the MTA's plan or by other appropriate steps taken by the MTA, then it will be necessary to

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[8] There seems to be an inconsistency in the MTA's position with respect to operators. Mr. Woodbury states in his declaration that "the hiring of additional operators will ensure that schedule assignments are filled." *See* Woodbury Decl. ¶ 20. In contrast, Mr. Spivack claims that hiring more operators is "a simplistic solution" and is "not cost-effective." *See* Spivack Decl. ¶ 12.

[9] It is difficult to understand why these types of improvements have not already been made given that the load factor reduction requirements have been in place since October of 1996.

consider further action in this area. Under the new reporting requirements set forth *infra* at V.8, the MTA is directed to report, on a quarterly basis, its progress in meeting this objective.

D. Other MTA Proposals to Address Reliability.

1. *Staged Bus Project.* The MTA also proposes a "staged" bus pilot project of up to ten buses (at an initial five locations) during peak hours on some of the most crowded lines. MTA Br. at 12-13. The MTA states that this program will enable it to respond quickly to service disruptions and mechanical malfunctions and to adjust headways to reduce overcrowding. *Id.* at 12. This program will be in place during 1999 as a temporary program and will be reevaluated before it is implemented further. *Id.* at 13.

Given the severity of the "missing bus" problem, the MTA is directed to proceed with the implementation of this pilot project. While it is hoped that the results will be helpful in reducing overcrowding, it is not possible to conclude at this time that this is a long-term solution to the load factor exceedence problem under the Consent Decree. The MTA shall report on the results of this pilot project in its Quarterly Report to the Special Master.

2. *Mechanics.* The BRU has recommended, as part of its remedial plan, an increase of the current mechanic workforce by approximately 184 new mechanics. BRU Remedial Plan at 5. The MTA opposes the plan, noting that the number of mechanics was increased by 47 in July 1998, and was further increased by six mechanics during the recent mid-year budget adjustment. MTA Br. at 13.

The MTA also has set some specific goals and claims significant progress already in meeting them. For example, the MTA plans to increase mean miles between total road calls (MBR) from 700 in July 1998 to 2,000 by June 2000 (and states it has achieved an average of 1,047 miles in recent months.) *Id.* at 14.

The evidence presented in the Administrative Record does not necessitate a finding at this time that the additional mechanics recommended by the BRU are necessary. The MTA must take all reasonable steps to ensure that it has in place an adequate workforce of mechanics to meet the LFTs as required by the Consent Decree. However, it is up to the MTA to determine specifically the number of mechanics that will be required for compliance and to include this information, as well as the progress it is making in achieving its goals in this area, in its Quarterly Reports.

3. *Automation.* The MTA includes in its remedial plan the procurement and installation of APCs on 20% of the fleet. It also recommends a pilot project to utilize TRS for vehicle tracking and remote supervision, thereby providing faster in-service control and adjustments. *See* Spivack Decl. ¶ 23; MTA Br. at 15. These appear to be useful actions which may facilitate monitoring and compliance in a timely and cost-effective manner. The MTA is directed to proceed with these steps as a component of the remedial plan to achieve compliance with the load factor targets established by the Consent Decree. *Id.*

E. Schedule Adherence.

The MTA attributes approximately 29% of the cause of load factor exceedence to failed schedule adherence, with approximately 63% of the scheduled adherence failures attributable to the early arrival of buses. MTA Br. at 5, 15; Woodbury Decl. ¶ 15. The MTA is not suggesting that 29% of the problem can be fixed through better management and on-street supervision of scheduled adherence. It is suggesting, however, that improvements in on-street supervision and better enforcement of the collective bargaining agreement will result in a significant reduction of the incidents of overcrowding. While Plaintiffs apparently attribute no quantifiable load factor improvement to better management of schedule adherence, they do recognize that "all else equal, maximizing schedule adherence will generally have a positive impact on reducing some overload conditions." Rubin Decl. ¶ 42. Nonetheless, the BRU asserts that the MTA significantly overstates the importance of schedule adherence to reduced load factors and compliance. BRU Br. at 20-24.

I have concluded that schedule adherence is a bit of a chicken-and-egg problem. It is as much a result of overcrowding as a cause of overcrowding. If sufficient buses are not provided on a route, then it follows that additional time will be required for passengers to board and deboard overcrowded buses, which will slow down travel speeds and cause the buses to fall behind schedule. Therefore, late buses may be in part a manifestation of insufficient capacity and unmet demand.

Moreover, there is ample evidence to suggest that there are a number of additional factors, clearly beyond

the control of effective management of scheduling adherence, which contribute to the late arrival of buses. These include traffic accidents, street construction, crime and police action incidents, passenger incidents such as illness, disabled vehicles, weather-related delays, spiked increase in ridership demand due to special events and excessive traffic congestion due to any number of factors. *See, e.g.*, MTA Br. at 15, 19; Rubin Decl. ¶¶ 42-43. On the other hand, there are remedial steps that are part of one or both of the proposed remedial plans that will have a positive effect on schedule adherence. These include adding additional capacity to handle passenger demand, refining bus schedules to reduce overcrowding, improving the reliability of buses to reduce in-service failures, and managing operator availability more successfully.[10] MTA Br. at 5-19; BRU Br. at 30-33.

I have concluded that adding additional capacity, refining schedules, improving bus reliability, and better management of operator availability will work in conjunction with more successful management of schedules to reduce load factor exceedence caused by poor schedule adherence. I expect that some progress will be made in reducing early arrivals. However, I find that mere efficient schedule adherence – without more – will not have a substantial impact on the problem of late arrivals. I would also note that while the MTA has taken steps to

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[10] On balance, however, as the MTA concedes, it is not possible to place very much confidence in the elimination of late bus arrivals through more efficient management of schedule adherence even though it is anticipated that as various other components of the remedial plan are implemented, schedule adherence will improve and late bus arrivals will be reduced.

improve field supervision of schedule adherence, the ranks of transit operations supervisors ("TOS") have been reduced from 385 in FY 1990 to only 186 today. MTA Br. at 18.[11]

Therefore, I have given far less credence to schedule adherence as an effective remedy for load factor violations. Only in those instances where load factor exceedence appears to be attributable to the early arrival of buses, perhaps on a so-called "hot run," have I given some weight to this component of the MTA's remedial plan. I have concluded that it is probable that *some* load factor reduction can be achieved by reducing the number of buses that arrive early through better schedule adherence management, and by implementing plans to improve on-street supervision of schedule adherence with particular emphasis on eliminating early arrivals, *if* these remedies are executed in conjunction with others, as outlined in this Decision. Accordingly, the MTA should proceed with all of the schedule adherence improvements outlined in its remedial plan.

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[11] The MTA proposes to refocus the efforts of the smaller TOS staff on street supervision by hiring additional Transportation Division Dispatchers (TDD) to handle duties unrelated to on-street supervision that are presently being handled by TOS staff, thereby allowing the TOS staff to devote their time to supervising the lines and providing instruction and training of operators. The MTA indicates that it is hiring retired TOS staff to serve as line regulators on an interim basis until additional personnel can be hired and trained, but the MTA has not indicted how many additional TOS personnel it plans to hire. The TOS staff formerly occupied with other duties are now in the field and form the basis of "Tiger Teams" who work in groups to monitor and patrol targeted lines. Spivack Decl. ¶ 8.

F. Remedy for Insufficient Capacity.

The MTA's operations planning staff initially analyzed the instances in which the 1.35 load factor target was exceeded by reviewing the numerous point checks conducted during 1998 on the 20 highest ridership bus lines. The MTA's analysis concluded that for 1,369 instances of overcrowding observed during 1,424 point checks, insufficient capacity (*i.e.*, not enough buses) was found to be the primary cause of only 19.2% of all instances where the load factor targets were exceeded. MTA Br. at 5. The MTA proposes to meet the 1.35 load factor target as soon as possible by adding 30 buses to the peak fleet. According to the MTA, these 30 buses, which are already in the fleet, will reduce overcrowding to a *de minimis* level no later than June 1999. *Id.* at 19. To meet the load factor target of 1.25 by June 30, 2000, the MTA proposes adding 130 additional buses to alleviate instances of overcrowding due to insufficient scheduled service (66 buses in June 1999 and 54 buses in December 1999). *Id.* at 19-20.

The determination that 130 additional buses are needed to achieve the 1.25 load factor target was based on a detailed line-by-line analysis of service. The MTA claims that these additional 130 buses will permit the MTA to reduce overcrowding to a *de minimis* level consistent with a 1.25 load factor target on or before the June 2000 deadline. *Id.* at 20.

The BRU has also conducted its own line-by-line analysis of 75 bus lines to determine the number of expansion trips required to meet the load factor target. Essentially, the BRU calculated the number of expansion

bus trips required by mapping insufficient capacity violations to determine the time period over which additional service would have to be added. An additional bus trip was added for every non-overlapping 20-minute period exhibiting at least one insufficient capacity violation. Bus trips were also added for time periods sandwiched between violation periods, or at the end of a range of violations. In some instances, the BRU calculated the number of bus trips by adjusting the "headways" (time between buses) and taking into account the "recycling" of buses. Under this analysis, the BRU calculated that a total of 606 buses would be required to meet the load factor targets. Subtracting the 53 additional buses that MTA already has scheduled to be purchased, the BRU has recommended an immediate purchase of 553 buses. Declaration of Ted Robertson ¶ 23 (dated Feb. 8, 1999).

The MTA argues that the BRU's bus acquisition plan is overstated because, among other things: (1) additional buses on selected bus lines in specific time periods are proposed, despite the absence of a documented history of overcrowding *within the specific time period*; (2) additional buses are proposed although no documented incidence of overcrowding has occurred for many months; (3) there is no attempt to mitigate overcrowding resulting from poor schedule adherence other than by adding more buses; (4) bus trips over converted into a number of additional buses required by using a method that employs only one of many available scheduling techniques for economizing the number of buses needed to operate at a specified level of service; and (5) the BRU estimates of the number of additional buses needed to achieve the 1.25 load factor reduction target are inflated because they are based on an

unreasonably high estimate of patronage growth over the next 18 months. MTA Br. at 49.

As indicated in the line-by-line analysis below, I have taken into account some of these criticisms and have adjusted the number of additional buses that would be required to meet the load factor targets as recommended by the BRU. I am not persuaded, however, that only recently documented incidents of overcrowding should be taken into account. Failure to meet the LFT on December 31, 1997 constitutes a "violation" and the pattern of LFT exceedence has continued throughout 1998. While substantial evidence of improvement may be taken into account on certain lines, there also may be seasonal variations which are relevant. It therefore is appropriate to consider violations that have occurred since January 1, 1998.

The MTA also maintains that it can provide a more cost-effective and efficient response to the need to reduce overcrowding through sophisticated scheduling techniques, which its highly-experienced Schedule Makers can undertake given their familiarity with the particular characteristics of the lines to which they are assigned.[12] The MTA believes that another common practice, involving deadheading buses (buses operating without

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[12] For example, when demand is not consistently high over all segments of a bus route, it is possible to operate a higher level of service over busy portions of a route and reduce levels of service over less heavily patronized segments. Additional buses can operate on the heavily patronized segments and then return for a second trip much sooner through a practice known as "short turn."

passengers back to their starting points, thereby making them available sooner for additional trips), is also an efficient and effective response to overcrowding. Similarly, the MTA suggests that on some routes, where a bus is no longer needed on one line, the same bus can be employed on a nearby line to meet scheduled trip needs through a process called interlining. Finally, the MTA argues for a more elaborate technique, which involves repackaging the combination of trips that will be operated by each bus assigned to a line (known as re-tieing service) and adjusting headways (the time between buses). Declaration of Frank Schroder ¶¶ 5-7 (dated Feb. 8, 1999) ("Schroder Decl."); MTA Br. at 21-2. The MTA believes that its use of all of these techniques will reduce the number of additional buses that will be required to remedy lack of capacity.

In addition, the MTA states that it cannot assimilate the 553 additional buses proposed by the BRU because of the limited physical capacity of the MTA's facilities (*e.g.*, room to park, ability to fuel, facilities to maintain). The MTA contends that its capacity is limited to an active fleet of 2,354 buses (including spares) within the current operating division structure. MTA Br. at 47. The MTA decided to close Division 12 (because of its cost-inefficient location) after the Consent Decree was executed, but even if this Division were reopened, it would apparently increase physical capacity by only 130 buses (including spares) to 2,484, at the additional annual cost of $2 million. *Id.* The MTA states that it currently operates over 1,700 peak buses. *Id.* An increase of 553 peak buses over the next 18 months would require it to have the ability to garage and maintain an active fleet of 2,704 buses (1,700 plus 553

equals 2,253 plus 20% spares equals 2,704). *Id.* Since the MTA's availability capacity at existing divisions would support an active fleet of 2,354 buses, the excess 350 buses over the MTA's capacity is the equivalent of one additional operating division. *Id.* Given the time required for funding, site location and acquisition, environmental planning, design and construction, the MTA contends that it would not be possible to provide this additional capacity within the timeframe recommended by the BRU. Declaration of Michelle Caldwell ¶¶ 4-5 (dated Feb. 8, 1999) ("Caldwell Decl.").

I do not find these arguments entirely persuasive. According to the Caldwell Declaration, the MTA currently has some excess capacity to accommodate additional buses. If Division 12 were reopened, the amount of excess capacity would increase by about 130 buses. It is also possible, as suggested by the BRU, that temporary arrangements could be made to accommodate additional buses within existing facilities or at temporary locations. BRU Rep. Br. at 16-19. The record does not show that, with careful and innovative planning, the MTA would be unable to accommodate the additional buses called for in the remedial plan set forth below.

Having reviewed the Administrative and Supplemental Record, the Special Master finds that a significant cause of the load factor violations is a bus fleet that is simply too small for the ridership demands placed upon it. See Mundle & Associates, Review of LACMTA's Bus Operating Plans at V-9 (March, 1998) (showing the substantial decrease in the MTA fleet of total, active and operational buses over the last decade.) For example, on October 19, 1988 the MTA had a total fleet of 2,957 buses,

2554 active buses, and 1998 operational buses. On July 27, 1997, there were 2,416 total buses, 2,103 active buses, and 1,666 operational buses. *Id.* at V-2. AR 77.[13] Given the evidence presented, an effective remedial plan must incorporate an increase in the size of the bus fleet. The Special Master's specific line-by-line findings are laid out below.

1. Meeting the 1.35 Standard

In order to calculate how many additional buses are required for the MTA to meet the 1.35 LFT, the Special Master began by reviewing the point check data provided by the parties and contained in the Administrative and Supplemental Record. For each of the 75 lines found to be out of compliance, the Special Master then determined the time range in the A.M. peak period (6:00-9:00 A.M.) in which the "insufficient capacity" violations occurred between January and September 1998. Violations in the afternoon peak and base periods were also considered; however the vast majority of violations attributable to insufficient capacity were in the morning peak periods. Unlike the BRU plan, time periods reflecting no violations that were sandwiched between violation periods, or found at the end of a range, were not included. For each

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[13] As noted in the BRU brief, on one day in July 1997, the MTA schedule required 1,743 buses to meet the afternoon peak, but there were only 1,666 operational buses that afternoon. The MTA was short 77 buses. BRU Br. at 9 (citing Mundle & Associates, Review of LACMTA's Bus Operating Plans at V-3 (March, 1998). *See also Id.* at V-13 (Operational Buses Versus Peak Requirement).

non-overlapping time period reflecting at least one such violation, an extra bus trip was added.[14]

To illustrate, data maintained on Line 1 show insufficient capacity violations between 6:00 A.M. and 6:20 A.M. and subsequently from 7:00 A.M. to 8:20 A.M. Since there are five (5) non-overlapping periods containing such violations, five extra bus trips are required. To determine the number of additional buses needed to run the additional trips, the Special Master considered the practice of "recycling" buses – *i.e.*, one bus covering two expansion trips by finishing the initial route, turning around and servicing the route again. In the case of Line 1, for example, the evidence contained in the record reveals that five buses are needed to cover the five additional bus trips.

In conducting this line-by-line analysis, schedule adherence was considered, although much less credence was given to this factor. The Special Master reviewed the data available in the Administrative and Supplemental Record to determine if schedule adherence could completely account for the violations in any given 20-minute time period. If so, that period was excluded from the calculation of the additional trips required to remedy that line.

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[14] Time periods containing *multiple* and *recent* violations coded as "unknown cause" by the BRU – *i.e.*, violations color-coded black in the BRU's Mapping of Load Factor Violations (AR Tab 59) – were also sometimes included in this calculation because they reflect a pattern of overcrowding that is likely due in part to insufficient capacity.

Moreover, the Special Master did take into account the MTA's advanced scheduling techniques such as deadheading, interlining and retying. However, given the excessive number of violations of the 1.35 LFT, which have continued during the past year, the record simply does not support the claims by the Schedule Makers that full compliance can be achieved on many of these lines by such scheduling techniques alone. Indeed, since the MTA has known the importance of meeting the LFT since October 1996, it must be assumed that many of these techniques have been used (without great success) over the past few years. With the improved reliability of the fleet, it is expected that these techniques will be more effective in the future. Thus, the Special Master has taken into account the MTA's ability to employ such practices in reducing the number of additional trips and buses needed to remedy violations caused by insufficient capacity. For example, the Special Master eliminated additional bus trips for periods which showed no violations but were sandwiched between time period with high concentrations of violations. Therefore, the MTA should exercise its full discretion in scheduling existing and added capacity to meet the LFTs as efficiently as possible, utilizing these techniques wherever possible; however, the MTA should be mindful that the Decree would not permit significant reductions, elimination, or reallocation of existing service to meet the load factor target. *See* Memorandum Decision and Recommendation in re Late Nite and Owl Service Modifications at 4-5; 15 (dated February 29, 1998).

Applying the methodologies described above, the Special Master finds that 332 buses should be added to

the peak fleet (277 buses + 55 spares (20%)) in order to meet the existing 1.35 load factor target. This calculation is broken down, line-by-line, as follows:

(1) *Line 1.*

Line 1 has exhibited insufficient capacity violations between 6:00-6:20 A.M. and 7:00-8:20 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that five additional buses are needed to bring this line into compliance with the 1.35 load factor target.

(2) *Line 2.*

Line 2 has exhibited insufficient capacity violations between 6:00-7:40 A.M. and 8:00-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that seven buses (servicing eight trips) are needed to bring this line into compliance with the 1.35 load factor target.

(3) *Line 4.*

Line 4 has exhibited insufficient capacity violations between 6:00-6:40 A.M., 7:00-7:40 A.M. and 8:00-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that seven buses are needed to bring this line into compliance with the 1.35 load factor target.

(4) *Line 10.*

Line 10 has exhibited insufficient capacity violations between 6:20-7:00 A.M. and 8:00-8:40 A.M. Based on the data and evidence contained in the Administrative

and Supplemental Record, the Special Master hereby finds that three buses are needed to bring this line into compliance with the 1.35 load factor target.

(5) *Line 14.*

Line 14 has exhibited insufficient capacity violations between 6:20-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that four buses (servicing eight trips) are needed to bring this line into compliance with the 1.35 load factor target.

(6) *Line 16.*

Line 16 has exhibited insufficient capacity violations between 6:20-7:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that four buses are needed to bring this line into compliance with the 1.35 load factor target.

(7) *Line 18.*

Line 18 has exhibited insufficient capacity violations primarily between 6:00-7:40 and 8:00-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that seven buses are needed to bring this line into compliance with the 1.35 load factor target.

(8) *Line 20.*

Line 20 has exhibited insufficient capacity violations between 6:00-7:20 and 7:40-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds

that seven buses are needed to bring this line into compliance with the 1.35 load factor target.

(9) *Line 26.*

Line 26 has exhibited insufficient capacity violations primarily between 6:00-8:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that four buses are needed to bring this line into compliance with the 1.35 load factor target.

(10) *Line 28.*

Line 28 has exhibited insufficient capacity violations between 6:20-8:20 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that five buses (servicing six trips) are needed to bring this line into compliance with the 1.35 load factor target.

(11) *Line 30.*

Based on the Administrative and Supplemental Record, the Special Master hereby finds that no buses are needed to bring this line at this time.

(12) *Line 33.*

Line 33 has exhibited insufficient capacity violations between 6:00-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that seven buses (servicing eight trips) are needed to bring this line into compliance with the 1.35 load factor target.

(13) *Line 38.*

Line 38 has exhibited insufficient capacity violations between 6:00-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that eight buses are needed to bring this line into compliance with the 1.35 load factor target.

(14) *Line 40.*

Line 40 has exhibited insufficient capacity violations between 6:00-6:20 A.M., 6:40-7:00 A.M. and 7:40-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that six buses are needed to bring this line into compliance with the 1.35 load factor target.

(15) *Line 45.*

Line 45 has exhibited insufficient capacity violations between 6:20-8:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that five buses are needed to bring this line into compliance with the 1.35 load factor target.

(16) *Line 53.*

Line 53 has exhibited insufficient capacity violations between 6:20-7:20 A.M. and 7:40-8:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that four buses are needed to bring this line into compliance with the 1.35 load factor target.

(17) *Line 55.*

Line 55 has exhibited insufficient capacity violations between 6:20-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that eight buses are needed to bring this line into compliance with the 1.35 load factor target.

(18) *Line 60.*

Line 60 has exhibited insufficient capacity violations between 6:00-8:20 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that seven buses are needed to bring this line into compliance with the 1.35 load factor target.

(19) *Line 66.*

Line 66 has exhibited insufficient capacity violations between 6:00-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that nine buses (servicing 10-12 trips) are needed to bring this line into compliance with the 1.35 load factor target.

(20) *Line 68.*

Line 68 has exhibited insufficient capacity violations between 6:00-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that nine buses are needed to bring this line into compliance with the 1.35 load factor target.

(21) *Line 70.*

Line 70 has exhibited insufficient capacity violations between 7:00-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that six buses are needed to bring this line into compliance with the 1.35 load factor target.

(22) *Line 76.*

Line 76 has exhibited insufficient capacity violations between 7:00-8:00 A.M. and 8:20-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that five buses are needed to bring this line into compliance with the 1.35 load factor target.

(23) *Line 78.*

Line 78 has exhibited insufficient capacity violations between 6:00-9:00 A.M. and 6:40-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that nine buses are needed to bring this line into compliance with the 1.35 load factor target.

(24) *Line 81.*

Line 81 has exhibited insufficient capacity violations between 6:00-6:20 A.M. and 6:40-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that seven buses are needed to bring this line into compliance with the 1.35 load factor target.

(25) *Line 90.*

Line 90 has exhibited insufficient capacity violations between 6:20-7:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that four buses are needed to bring this line into compliance with the 1.35 load factor target.

(26) *Line 94.*

Based on the Administrative and Supplemental Record, the Special Master hereby finds that no buses are needed to remedy this line at this time.

(27) *Line 105.*

Line 105 has exhibited insufficient capacity violations between 6:20-7:00 A.M., 7:20-7:40 A.M. and 8:00-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that four buses are needed to bring this line into compliance with the 1.35 load factor target.

(28) *Line 108.*

Line 108 has exhibited insufficient capacity violations between 6:00-7:40 A.M. and 8:00-8:20 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that six buses are needed to bring this line into compliance with the 1.35 load factor target.

(29) *Line 110.*

Line 110 has exhibited insufficient capacity violations between 6:40-7:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental

Record, the Special Master hereby finds that one bus is needed to bring this line into compliance with the 1.35 load factor target.

(30) *Line 111.*

Line 111 has exhibited insufficient capacity violations between 6:40-7:20 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that one bus is needed to bring this line into compliance with the 1.35 load factor target.

(31) *Line 152.*

Line 152 has exhibited insufficient capacity violations between 6:00-6:40 A.M. and 7:00-7:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that four buses are needed to bring this line into compliance with the 1.35 load factor target.

(32) *Line 161.*

Line 161 has exhibited insufficient capacity violations between 6:00-6:20 A.M., 6:40-7:00 A.M. and 7:40-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that four buses (servicing five trips) are needed to bring this line into compliance with the 1.35 load factor target.

(33) *Line 163.*

Line 163 has exhibited insufficient capacity violations between 6:20-7:20 A.M. and 7:40-8:00 A.M. Based on the data and evidence contained in the Administrative

and Supplemental Record, the Special Master hereby finds that four buses are needed to bring this line into compliance with the 1.35 load factor target.

(34) *Line 165.*

Line 165 has exhibited insufficient capacity violations between 6:20-7:40 A.M. and substantial violations between 3:00 P.M.-6:00 P.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that nine buses are needed to bring this line into compliance with the 1.35 load factor target.

(35) *Line 166.*

Line 166 has exhibited insufficient capacity violations between 6:00-7:00 A.M. and substantial violations between 3:40-5:40 P.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that four buses are needed to bring this line into compliance with the 1.35 load factor target.

(36) *Line 175.*

Based on the Administrative and Supplemental Record, the Special Master hereby finds that no buses are needed to remedy this line at this time.

(37) *Line 180.*

Line 180 has exhibited insufficient capacity violations between 6:00-6:20 A.M. and 6:40-8:20 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby

finds that six buses are needed to bring this line into compliance with the 1.35 load factor target.

(38) *Line 200.*

Line 200 has exhibited insufficient capacity violations between 6:40-8:20 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that three buses are needed to bring this line into compliance with the 1.35 load factor target.

(39) *Line 204.*

The Administrative and Supplemental Record do not contain sufficient data to fashion a remedy for this line.

(40) *Line 205.*

Line 205 has exhibited insufficient capacity violations between 7:00-7:20 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that one bus is needed to bring this line into compliance with the 1.35 load factor target.

(41) *Line 206.*

Line 206 has exhibited insufficient capacity violations between 6:00-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that nine buses are needed to bring this line into compliance with the 1.35 load factor target.

(42) *Line 207.*

Line 207 has exhibited insufficient capacity violations between 6:20-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that eight buses are needed to bring this line into compliance with the 1.35 load factor target.

(43) *Line 210.*

Based on the Administrative and Supplemental Record, the Special Master hereby finds that no buses are needed to remedy this line at this time.

(44) *Line 212.*

Line 212 has exhibited insufficient capacity violations between 6:00-7:40 A.M. and 8:00-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that seven buses are needed to bring this line into compliance with the 1.35 load factor target.

(45) *Line 230.*

Line 230 has exhibited insufficient capacity violations between 7:00-7:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that two buses are needed to bring this line into compliance with the 1.35 load factor target.

(46) *Line 232.*

Line 232 has exhibited insufficient capacity violations primarily between 6:00-7:20 A.M. and 7:40-8:40 A.M.

Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that seven buses are needed to bring this line into compliance with the 1.35 load factor target.

(47) *Line 234.*

Line 234 has exhibited insufficient capacity violations between 6:20-7:00 A.M., 7:20-7:40 A.M. and 8:00-8:20 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that four buses are needed to bring this line into compliance with the 1.35 load factor target.

(48) *Line 243.*

Line 243 has exhibited insufficient capacity violations between 6:00-8:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that five buses (servicing six trips) are needed to bring this line into compliance with the 1.35 load factor target.

(49) *Line 251.*

Line 251 has exhibited insufficient capacity violations between 6:40-9:00 A.M. and 3:00-5:40 P.M. Based on the data and evidence contained in the Administrative and Supplemental record, the Special Master hereby finds that seven buses are needed to bring this line into compliance with the 1.35 load factor target.

(50) *Line 260.*

Line 260 has exhibited insufficient capacity violations between 6:00-8:40 A.M. and 3:20-5:40 P.M. Based on the data and evidence contained in the Administrative and

Supplemental Record, the Special Master hereby finds that eight buses are needed to bring this line into compliance with the 1.35 load factor target.

(51) *Line 268.*

Line 268 has exhibited insufficient capacity violations between 6:40-7:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that one bus is needed to bring this line into compliance with the 1.35 load factor target.

(52) *Line 420.*

Line 420 has exhibited insufficient capacity violations between 6:40-7:40 A.M. and 8:00-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that three buses are needed to bring this line into compliance with the 1.35 load factor target.

(53) *Line 424.*

Line 424 has exhibited insufficient capacity violations between 6:00-6:40 and 8:00-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that four buses are needed to bring this line into compliance with the 1.35 load factor target.

(54) *Line 446.*

Line 446 has exhibited insufficient capacity violations between 6:20-7:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that three buses

are needed to bring this line into compliance with the 1.35 load factor target.

(55) *Line 484.*

Line 484 has exhibited insufficient capacity violations between 6:00-6:20 A.M. and 7:00-7:20 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that two buses are needed to bring this line into compliance with the 1.35 load factor target.

(56) *Line 522.*

Line 522 has exhibited insufficient capacity violations between 6:20-9:00 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that eight buses are needed to bring this line into compliance with the 1.35 load factor target.

(57) *Line 561.*

Line 561 has exhibited insufficient capacity violations between 6:20-8:40 A.M. Based on the data and evidence contained in the Administrative and Supplemental Record, the Special Master hereby finds that five buses are needed to bring this line into compliance with the 1.35 load factor target.

2. *Meeting the 1.25 Standard.*

To determine the number of additional buses that will be required for the MTA to meet the 1.25 LFT in June 2000, both the MTA and the BRU have presented estimates of the expected ridership growth over the next two years. Based on 1998 statistics from the National Transit

Database Section 15 Report, the BRU projects a two year growth rate of 12%: comprised of a 4.8% ridership increase in 1998, a 4.8% increase in 1999, plus a 1.5% per year increase due to improved service. *See* BRU Remedial Plan, p. 6 n. 13. The MTA, on the other hand, projects a growth rate of 7.14% for the next 18 months based upon limited sampling. MTA Br. at 53.

Utilizing its growth estimate, the BRU's remedial plan calculates the projected ridership for each line and determines the number of additional bus trips necessary to accommodate this level of service. BRU Remedial Plan at 6-7. Using this methodology, and based upon its analysis that 348 additional buses are required to meet the 1.35 LFT, the BRU has concluded that an additional 157 buses (plus 20% or 31 spares) should be added to the peak fleet to meet the 1.25 LFT. *Id.* The MTA, however, estimates that only 130 additional buses are needed to meet the 1.25 LFT. MTA Remedial Plan at V1-V5.

Based on the evidence presented, the Special Master finds that 12% is an appropriate estimate of projected ridership growth for the next two years. Indeed, the MTA's own Regional Transmit Alternatives Analysis (dated Nov. 9, 1998) (AR Tab 104) projects cumulative bus ridership increases up to 25.1% from FY1998 to FY2000. *See* Rubin Decl., Exhs. 3, 6.

Using this 12% multiplier, and applying the Special Master's line by line analysis, I find that 126 buses should be added to the fleet to meet the 1.25 LFT (over and

above those needed to meet the 1.35 LFT).[15] Factoring MTA's standard spare ratio of 20%, a total of 151 buses will be required to meet this next target by June 2000.

In sum, to remedy the load factor violations based by "insufficient capacity" the MTA would need to add a total of 430 new buses to the fleet (277 plus 55 spares to meet the 1.35 LFT and 126 plus 25 spares to meet the 1.25 LFT, minus 53 buses already scheduled by MTA for purchase).

G. Provisional remedy during interim period while buses are ordered.

Because the achievement of the load factor target requires immediate improvements that are only possible with additional capacity, and because the procurement of buses generally requires an 18-month cycle, the BRU further purposes that the MTA immediately lease or otherwise obtain on a temporary basis 348 CNG buses to operate until the new buses arrive. BRU Br. at 33. The MTA contends that this would be impossible to implement as there are no such transit buses available in the market. MTA Br. at 47-49. Specifically, purchasing buses directly from U.S. manufacturers would involve an extensive contract negotiation process and the only manufacturers that may have currently available production capacity do not have proven low-floor CNG products. *Id.*

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[15] Since the Special Master's line by line findings reveal that the BRU's 1.35 estimates were overstated by approximately 20% (due to its inclusion of buses for periods where there were no violations and its underreliance on schedule adherence and other scheduling techniques), I have discounted the BRU's 1.25 estimates of 157 buses by the same percentage.

at 48. The MTA has explored international sources of buses, but there are significant reservations about bringing foreign buses into the MTA's operating environment due to maintenance constraints (*e.g.*, all metric dimensions and fasteners), availability of equipment and training of personnel to operate and maintain new foreign equipment. Furthermore, no foreign equipment manufacturer currently produces buses certified to operate in the U.S. nor are they likely to because of Buy America constraints. *Id.;* Drayton Decl. ¶ 14.

Taking into account these arguments, I have concluded that the BRU is correct in its assertion that the MTA likely cannot meet the 1.35 load factor target "as soon as possible" (and the 1.25 load factor target by June 2000) unless it acts immediately to obtain additional buses on a temporary basis to remedy the load factor violations caused by insufficient capacity. In order to meet the requirements of Section II.A of the Consent Decree, the MTA therefore should use its best efforts to lease or obtain, by whatever means available, at least 277 additional buses of any type appropriate for service on the MTA system.[16] These buses should be scheduled for delivery on or before December 31, 1999 and should remain in service until the new buses required by the remedial plan are delivered.

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[16] This number is taken from the Special Master's findings concerning the number of buses needed to remedy the 1.35 load factor violations caused by insufficient capacity (without spares).

H. Section II.B of the Consent Decree.

Under Section II.B of the Consent Decree, the MTA was required to "make available 51 additional buses (*i.e.*, buses in addition to those already planned for replacement purposes) by the end of calendar year 1996 to reduce overcrowding, initiate new services and improve mobility and access for its dependent riders. Another 51 additional buses (*i.e.*, buses in addition to those already planned for replacement purposes) to reduce overcrowding will be available by June 30, 1997 for a net of 102 additional buses." The MTA has temporarily met this requirement by extending the life of buses scheduled for replacement. In previous rulings I have indicated that eventually the MTA would have to retire the expansion buses and obtain 102 new buses, which would constitute a net addition to the fleet. While the Consent Decree did not specify a deadline, I indicated that the matter would be considered in connection with a remedial plan. The time is now ripe, and I am therefore directing the MTA to obtain an additional 102 buses (over and above the buses to be obtained through the accelerated replacement plan and over and above the additional buses required by the remedial plan to remedy insufficient capacity). These 102 additional new buses should be delivered, as net additions to the active fleet, on or before June 30, 2002, the date by which the MTA is required to meet the 1.2 LFT. These buses may be used by the MTA to meet and sustain the reduced LFT, or for new services.

V. SPECIAL MASTER'S DETERMINATION OF REMEDIES NECESSARY FOR COMPLIANCE WITH THE OCTOBER 1996 CONSENT DECREE

The Special Master has determined based on the foregoing that, in order to achieve compliance with the 1996 Consent Decree, the MTA should implement the remedies outlined below. The MTA is directed to move expeditiously to:

1. *Remedy violations attributable to inoperable buses.*

In order to achieve compliance with the Consent Decree, the MTA should:

(a) fully implement its accelerated bus procurement plan by replacing 538 aging vehicles with new CNG buses by June 2000;

(b) complete the conversion of 333 ethanol buses by December 1999; and

(c) complete the repair of the 594 CNG buses under warranty by May 1999.

2. *Remedy violations attributable to lack of operators.*

In order to achieve compliance with the Consent Decree, the MTA should:

(a) implement its program to improve the management of bus operator availability; and

(b) substantially eliminate load factor violations attributable to the lack of an operator by December 31, 1999. If by the time of its Quarterly Report to the Special Master on January 10, 2000, violations of the 1.35 load factor standard attributable to the unavailability of an

operator are not substantially eliminated, the Special Master will consider directing the MTA to increase its operator assignment ratio of 1.16 to a ratio that will appropriately eliminate all violations attributable to this causal factor.

3. *Remedy violations attributable to in-service failures.*

In order to achieve compliance with the Consent Decree, the MTA should:

(a) initiate its staged buses pilot demonstration project by utilizing ten buses at five locations during 1999 and report to the Special Master its evaluation of this pilot project by January 10, 2000;

(b) hire a sufficient number of additional mechanics, improve training and supervision, and establish performance quality standards for mechanics, that will enable the MTA to meet its objective of increasing mean miles between total road calls (MBR) from 700 in July 1998 to 2,000 by June 2000;

(c) create/expand a recurring defects analysis program;

(d) improve its spare parts management; and

(e) undertake improvements to service reliability, including emergency service for bus accidents, advance notice of special events, traffic management and a new radio system. The MTA should include in its Quarterly Reports (see below) to the Special Master information on the progress in meeting this objective. If sufficient progress in reducing violations attributable to in-service failures is not reported by January 10, 2000, more specific remedies may be required in this area.

4. *Remedy violations attributable to "missed trips".*

In order to achieve compliance with the Consent Decree, the MTA should:

(a) provide training to operators to improve consistency of actions and deployment of operations supervisors at recurring sites; and

(b) procure and install APCs on 20% of the fleet and initiate a TRS pilot project for tracking and remote supervision to provide faster in-service control of problem areas.

5. *Remedy violations attributable to poor schedule adherence.*

In order to achieve compliance with the Consent Decree, the MTA should:

(a) deploy additional on-street supervisors who will devote most of their time to supervising schedule adherence;

(b) utilize automated passenger counters and radio system monitoring techniques to identify problem routes, runs and operators; and

(c) collect data and evaluate new technologies that will be helpful in reducing late operations. Progress on these issues shall be included in the Quarterly Reports to the Special Master.

6. *Remedy violations attributable to insufficient capacity.*

In order to achieve compliance with the Consent Decree, the MTA should:

(a) purchase 430 new CNG buses to provide the additional capacity required to reduce the load factor target to 1.35 as soon as possible and to meet the 1.25 load factor target by June 2000, which includes:

(1) 277 buses to add trips to the lines with "insufficient capacity" violations to meet the 1.35 LFT;

(2) 55 spares (20% of 277);

(3) 126 buses to meet the 1.25 LFT; and

(4) 25 spares (20% of 126); minus

(5) 53 buses already planned by MTA for purchase.

(b) hire additional full-time operators to operate the new service, as required;

(c) hire additional mechanics as needed to meet the new service requirements; and

(d) obtain, through lease or other means, 277 buses on a temporary basis to meet the 1.35 load factor target as soon as possible until the new purchased buses arrive.

Although the determination of the number of additional buses that are required to reduce load factor violations attributable to insufficient capacity is based in substantial part on a line-by-line analysis of the causes of the violations during 1998, the MTA has the flexibility to schedule its service in a way that will maximize the efficiency of the fleet and will enable the MTA to meet the load factor targets as quickly and cost-effectively as possible. While meeting this objective may require some

adjustment of schedules and some utilization of scheduling techniques such as short runs, retying, deadheading, repackaging, and other means, the MTA should not significantly reduce service to the transit-dependent in order to meet the load factor targets on the specified routes.

7. *Remedy violations attributable to MTA's having an undersized fleet.*

In order to achieve compliance with the Consent Decree, the MTA should procure an additional 102 new buses to satisfy the requirement of Section II.B of the Consent Decree, for delivery on or before June 30, 2002. These buses must be in addition to the buses scheduled for replacement and the buses procured pursuant to Section 6 above, and shall result in a net increase to the size of the operating fleet of 102 additional buses.

8. *Providing for adequate monitoring and reporting.*

In order to achieve compliance with the Consent Decree, the MTA should:

(a) provide additional staff to ensure adequate monitoring of overcrowding levels;

(b) continue to conduct point checks two times a month on the top 20 lines and increase the frequency of the point checks to once a month on the additional 55 lines that were found not in compliance; and

(c) prepare and submit to the Special Master a Quarterly Report that tracks all remedial actions on a per-line and system-wide basis. The Quarterly Report should include, but not be limited to (1) cancelled and late runs totaled for each month categorized by amount, reason, bus series and line; (2) equipment failures in-service

listed by amount, reason, bus service and line; (3) missing operators summarized by reason per month; (4) point check data matched to scheduled times and bus runs, with analysis of each violation; and (5) a mapping of load factor violations for each line over time.

The MTA shall submit a Quarterly Report within ten (10) days after the end of each quarter (*e.g.*, April 10, July 10, October 10, January 10).

IT IS SO ORDERED.

/s/ Donald T. Bliss
SPECIAL MASTER

Date: March 6, 1999

[Exhibits Omitted In Printing]

PROOF OF SERVICE

The foregoing document described as MEMORANDUM DECISION AND ORDER has been served on March 8, 1999, via the United States Postal Service by first-class pre-paid mail in sealed envelopes to the following parties:

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/s/ Donald T. Bliss
SPECIAL MASTER

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

PROCEEDING BEFORE SPECIAL MASTER

LABOR/COMMUNITY STRATEGY CENTER, et al., Plaintiffs, vs. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY and JULIAN BURKE, Defendants.	CASE NO. CV 94-5936 TJH (MCx) **IN RE: LOAD FACTOR COMPLIANCE**

MEMORANDUM DECISION & ORDER RE: MOTION FOR CLARIFICATION AND MODIFICATION

INTRODUCTION AND SUMMARY OF DECISION

In its Motion For Clarification and Modification of the Special Master's March 6, 1999 Order (the "Motion" or "MTA Motion"), the Metropolitan Transportation Authority ("the MTA") challenges only the two paragraphs of the Special Master's remedial plan (Paragraphs 6 and 7) that quantify the number of additional expansion

buses needed to comply with the Consent Decree.[1] The remainder of the MTA's petition, however, raises for the first time a number of issues going to the heart of the Consent Decree and the Special Master's powers specified therein. For this reason it is useful to revisit briefly the history of the Consent Decree.

The Consent Decree was, first and foremost, a compromise. Of the three major components of the Consent Decree – reduced fares, enhanced county-wide mobility for the transit-dependent and reduced overcrowding – it was the latter issue that proved to be the most intractable and that threatened to unravel any agreement. The Plaintiffs initially insisted on quantifying in the Decree the number of buses that the MTA would be required to obtain in order to reduce overcrowding and restore the deteriorating quality of bus service. Despite several negotiation sessions, however, the parties could not agree on a specific number of buses.

This settlement impasse was finally overcome through the introduction of the load factor concept. Rather than specifically identifying at the outset the number of buses required to remedy the problems and conditions giving rise to the litigation, the parties agreed on an objective performance standard and a set of specific procedural mechanisms to address the severe problems of bus overcrowding in Los Angeles.

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[1] The March 6, 1999 Memorandum Decision and Order is hereinafter referred to alternatively as the March 6 Order or the March 6 Memorandum Decision.

In order to encourage cooperation on technical issues while ensuring accountability and fairness, the parties introduced into the Decree several components of dispute resolution. Under the procedures set forth in Sections II.A.4. and V.B. of the Decree, the MTA is to have substantial flexibility – initially – in meeting the load factor targets. However, if the targets are not met, or if there is a disagreement about whether they in fact have been met, the Consent Decree provides specific mechanisms to address and resolve these issues. These mechanisms include an initial referral to the Joint Working Group ("JWG") to "determine whether the targets have been met" and, if not, "whether sufficient funds have been reprogrammed to meet the next target."[2] Consent Decree

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[2] With interpretive guidance from the Special Master the JWG was able to agree on which bus lines were noncompliant; however, it reached an impasse on the remedy. After exhaustive but unsuccessful efforts to mediate an agreement between the parties, the Special Master issued his March 6 Memorandum Decision "resolving" the dispute as to the remedial plan necessary to comply with Section II.A. of the Consent Decree.

That section, of course, also refers to the reprogramming of sufficient funds to meet the load factor targets. Neither party as yet has pressed the Special Master to identify specifically what funds, if any, should be reprogrammed to comply with the Decree, although in its petition, the MTA apparently acknowledges that the Special Master has the power to find that sufficient funds must be reprogrammed. *See* MTA Motion at 12-13. Instead, the Special Master has identified the specific steps that need to be taken to comply with Section II.A so that the MTA can determine the most cost-effective way to reprogram the funds to meet its obligations under the Decree. By this approach, the Special Master has sought to limit his Order to the actions deemed necessary to comply with Section II of the Decree and to defer to the MTA, at least for the present, on

§ II.A.4. If the JWG is unable to resolve the matter, the dispute is to be referred to the Special Master. *Id.* Section V.B. establishes a resolution process that expressly applies to disputes arising under Section II and authorizes the Special Master to establish "procedures" to "mediate" the dispute informally with the attorneys to the parties (a Stage I proceeding) and, if that is not successful, to "resolve" the dispute through a more formal (Stage II) proceeding.[3] *Id.* § V.B.

To dispel any doubts about the Special Master's authority, this dispute resolution mechanism was reaffirmed in Section 4 of the stipulated and Court-approved Order of Reference which provides that: "[i]f the attorneys for the parties cannot resolve matters informally pursuant to the Consent Decree, the attorneys shall refer the matter to the Special Master for *resolution*, pursuant to procedures set forth by the Special Master." Stipulation and Order re Appointment of Donald T. Bliss as Special Master and Order of Reference (dated Nov. 21, 1996)

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funding sources. To the extent that the March 6 Memorandum Decision is not crystal clear on this point, however, I do find that the MTA has not allocated, through reprogramming or otherwise, sufficient funds to procure and operate an adequate number of expansion buses to remedy the load factor violations attributable to insufficient capacity.

[3] Section V.B. further provides that "[a]ny matter *resolved* by or referred to the Special Master may be reviewed by the District Court, along with the recommendations of the Special Master, if any, upon motion by either of the parties." (emphasis added). Plainly, either party has the option of accepting and adhering to the Special Master's "resolution" or filing a motion with the Court seeking review of his decision.

("Order of Reference") ¶ 4 (emphasis added).[4] Therefore, the parties have agreed to a set of procedures that initially allow the MTA considerable flexibility in meeting the load factor targets, but that also create a dispute resolution process in the event the MTA fails to meet the targets. This process ultimately results in a referral to the Special Master of matters in dispute, and allows both parties the right to appeal the Special Master's decisions to the District Court.

Seen in this light, the MTA's petition fails to acknowledge the *consensual* nature of the Decree and the specific powers and duties conferred by the language of the Decree and the Special Master's Order of Reference.[5] The MTA's newfound view that only the MTA, in its sole discretion, can fashion a remedial plan designed to meet the load factor standards does not square with the language of the Decree or the purpose for which the dispute resolution procedures of the Decree were created. Indeed, the MTA's argument comes too late – more than two and one-half years into the implementation of the Consent Decree. After invoking the Special Master's authority on previous occasions, the MTA cannot now be heard to disavow the Special Master's agreed-upon authority to resolve remedial disputes.

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[4] The Order of Reference also invokes Fed. R. Civ. P. 53, but states that "[i]n the event of any conflict between the terms of the Consent Decree and Rule 53 . . . the Consent Decree shall govern." *Id.* ¶ 5.

[5] Significantly, both the Consent Decree and the Order of Reference incorporate the parties' agreement on the selection of a Special Master and the enumeration of his powers.

The other substantive points raised by the MTA, and vigorously opposed by the Plaintiffs, concern the methodologies used by the Special Master in calculating the number of buses required to remedy the load factor violations caused by an inadequate fleet size. The MTA takes issue with the Special Master's remedial approach, which adds an additional bus *trip* for every 20-minute period on a bus line exhibiting a load factor violation attributable to insufficient capacity. The MTA also introduces new evidence, supplementing the Administrative Record, to support its contention that scheduling techniques can reduce the number of buses needed to cover the additional trips which the March 6 Order found are necessary to meet the load factor targets.

For the reasons discussed more fully below, *see* pp. 22-24, *infra*, I find that the MTA has not demonstrated that this theoretical exercise undertaken after the March 6 Order would work in practice as described in the present Motion, or that the adoption of these techniques could reduce significantly the number of expansion buses required without adversely affecting existing service or imposing additional burdens on the MTA's ridership. I have given the MTA's argument careful consideration and have studied the supplementary headway sheets provided. Unfortunately, the backup data presented are not supported by specific declarations explaining the workings of the techniques on a line by line basis. During oral argument on May 11, there was some clarification of how these techniques might work for certain lines by using expansion buses on more than one line through practices such as interlining or short runs. *See* Transcript of May 11, 1999 Oral Argument ("Tr.") at 51-57. However, given

the limited evidence presented in the Administrative Record, it is nearly impossible to evaluate the effectiveness and practicality of these sophisticated scheduling techniques or to come to a more definitive conclusion concerning whether these techniques will potentially result in a significant reduction in service to the transit-dependent on other lines.[6]

Despite these difficulties with the data, I do find that some use of the MTA's scheduling techniques can legitimately decrease further the number of expansion buses needed to cover the trips added by the March 6 Order. Having reviewed the MTA's scheduling data, I conclude that 23 of the buses found to be necessary in the March 6 Order can be eliminated by linking together two or more trips for service by a single bus. *See* p. 24, *infra*.

Moreover, I have also considered the MTA's arguments concerning the allocation of additional buses on lines exhibiting numerous and recent – but heretofore causally undetermined – load factor violations. Since approximately half of the total load factor violations are attributable to insufficient capacity, the March 6 Memorandum Decision applied this same ratio to some, but not all, of the lines that exhibited numerous and recent violations which remain unanalyzed for cause. Having reconsidered the evidence, I remain convinced that this approach is consistent with the provisions of the Decree.

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[6] I continue to wonder why, if the MTA can remedy the overcrowding caused by *insufficient capacity* through sophisticated scheduling techniques rather than by adding more buses, it has not already done so to achieve the load factor targets that were established in October 1996.

Nonetheless, I have revisited each of these lines and made additional modifications, eliminating an additional six buses where there were only a few unanalyzed violations that occurred early on in the monitoring period. *See* p. 25, *infra*.

With these modifications, as described more fully below, the MTA should move as expeditiously as possible to meet its obligations under the Consent Decree by funding, obtaining, and integrating into its fleet the additional expansion buses required to meet the load factor targets.[7] This includes moving forward with good faith efforts to procure temporary buses, whether new or old, to comply with the Decree while it awaits the arrival of the additional new buses. The Consent Decree requires that the MTA apply its best efforts to this task and report on its progress via the quarterly reports.[8]

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[7] During oral argument, the MTA questioned the wisdom of purchasing new buses to serve as spares. Tr. at 61. The record shows that a minimum spare ratio of 20 percent is needed for bus operations. Administrative Record ("AR") Tab 77 at V-8. To the extent, however, that the MTA faces legitimate obstacles in procuring the required number of buses in the time frame provided in the remedial plan, and concludes that proper staggering of new deliveries would enhance overall efficiency, it may propose in its quarterly reports to defer, up to 12 months, the delivery date of the new vehicles intended to serve as spares. If it does so, the MTA should ensure that there is in place an acceptable method of utilizing the existing fleet (such as by deferring the retirement of a few of the existing buses) solely to provide the necessary spares for the incoming additional capacity buses.

[8] In its proposed remedial plan, the MTA has already committed to add 160 buses to remedy insufficient capacity violations, 30 buses before June 1999 and 130 buses by

With regard to both the *temporary* buses and the *new* expansion buses, I note that the MTA objected in its brief and during oral argument to the fact that the March 6 Order specifies the "type" of vehicle that is needed to ensure compliance with the Consent Decree. *E.g.*, MTA Motion at 12. I therefore want to make clear that the MTA continues to hold discretion over the *types* of vehicles needed to satisfy the additional fleet capacity found to be necessary by the March 6 Order, as modified by this Order. For the new expansion buses, the Special Master designated CNG buses because these buses are currently being purchased and employed on the overcrowded lines and because there are important environmental benefits from the use of these vehicles. However, if the MTA determines that alternative vehicles, *providing equivalent expansion capacity*, would meet the requirements of the Consent Decree and other applicable requirements more effectively and efficiently, it may pursue appropriate alternatives and explain its reasons in the quarterly reports.[9]

December 1999. With the modifications described above, the Special Master's remedial plan would require the MTA to use its best efforts to obtain 248 buses on a temporary basis, which is 88 more buses than the MTA has already committed to provide.

[9] The MTA also has argued that the Special Master should specify only the number of additional trips that are required to comply with the Consent Decree and *not* the number of buses needed to cover the additional trips. However, the MTA's proposed use of schedule adherence management and advanced scheduling techniques to remedy *insufficient capacity* violations has been hotly disputed in the JWG and by the parties. Given the history and language of the Consent Decree, as described in this Decision and the March 6 Decision, I have

In response to the MTA's Motion, several additional clarifying points should be made.

As the Special Master has indicated on several occasions, the Consent Decree does not require perfection. If the MTA can demonstrate that it has taken all reasonable steps within its power to comply, it would be appropriate at that point (and only at that point) to excuse as *de minimis* or immaterial isolated violations occurring over significant intervals. Until the MTA has demonstrated a good faith, comprehensive effort to remedy both the "missing bus" and the "insufficient capacity" causes of the load factor violations, however, it is premature to establish a precise *de minimis* standard. Implementation of the remedial plan set forth in the March 6 Order, as clarified and modified by this Order, together with timely quarterly reports explaining the MTA's efforts to cope with issues and problems along the way, would likely constitute such a good faith effort meriting a finding of *de minimis* or immaterial non-compliance for isolated, non-repeating and explainable violations.[10]

For present purposes, however, there is no basis in the Decree for drawing a principled distinction between "one violation per time period" versus "two or three

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concluded that a finding on the specific number of expansion buses (or equivalent vehicular capacity) is critical to the resolution of this dispute.

[10] Under these circumstances, isolated instances of overcrowding attributable to a school letting out early or a major traffic accident could be considered *de minimis* or immaterial. *Cf.* Declaration of Dana Woodbury (dated Apr. 15, 1999) ("Woodbury Decl.") ¶ 13.

violations per time period." As stated. in the March 6 Order, and repeated by the Plaintiffs during oral argument, there are many overcrowded buses that do not violate the Consent Decree because to constitute a single load factor violation of the 1.35 target there must be an average of more than 15 people standing on all the buses passing the point check during a non-overlapping 20-minute peak period. March 6 Order at 20; Tr. at 87-88. Moreover, the "violations" are based on samples that, for most of the 77 lines, are conducted at infrequent intervals.[11] *Id*. For many of the lines on which additional trips are required, single violations in specific time periods are followed by multiple violations in adjacent 20-minute periods, indicating a compelling need to spread out the additional trips during the morning peak period. Given the magnitude of the violations and the lack of success to date in remedying them, there is no justification for ignoring, at the design phase of the remedial plan, specific violations of the load factor requirements.

In connection with this remedial stage, it also bears repeating that the March 6 Order made a critical distinction between violations caused by equipment malfunctions and violations resulting from insufficient capacity. Both the MTA and the Plaintiffs agree that about half of the load factor violations are caused by missing buses – in large measure attributable to the deterioration of an overage bus fleet and the deferral of bus replacements for many years. March 6 Order at 22-23. In addressing these

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[11] For example, for 57 of the 77 lines, the checks may have been performed as infrequently as once per quarter. AR Tab 81 at 115-116.

violations, the Special Master rejected the Plaintiffs' proposed remedy and essentially adopted the MTA's accelerated replacement schedule and other related remedies. The MTA's Accelerated Bus Replacement Program represents a substantial investment made by the MTA to remedy conditions of overcrowding caused by an unreliable and aging fleet. The MTA should be commended for making this multi-million dollar investment and for securing an accelerated stream of *replacement* buses.[12] In order for the remedies to prove effective, however, the new buses scheduled to replace the over-age buses should be used for their intended purpose; they should not be redirected to fulfilling (or counted against) the additional capacity remedies enumerated in the March 6 Memorandum Decision, as modified by this Order. Adherence to the letter and the spirit of the Consent Decree requires *expansion* buses to add capacity and increase the size of the active fleet. That is what the present dispute is about.

The Special Master recognizes that severe time constraints face the MTA. While the MTA has in place a sound program that will address the "missing bus" cause of the load factor violations, it has not moved expeditiously to remedy, through fleet expansion, the "insufficient capacity" violations. In trying to catch up at this late

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[12] The MTA states that, as a result of the Accelerated Bus Procurement Plan, its *replacement* schedule will provide a total of 2,095 new buses from FY98 through FY04. The MTA notes that this represents approximately 782 buses over and above what it contemplated for *replacement* at the time the Consent Decree was signed, at an additional cost of $300 million. *See* MTA Motion at 8.

stage, the MTA undoubtedly will need to satisfy various legal prerequisites and may confront unanticipated obstacles. These problems will have to be addressed if and when they present themselves. In the meantime, progress should be detailed in the quarterly reports.[13]

Finally, I hasten to point out that the March 6 Order reflects my best judgment, based on the Administrative Record, concerning the *expanded fleet capacity* that is required to meet the MTA's load factor obligations under the Consent Decree. While this calculation has been made on a line-by-line basis, the remedial plan does not. require the MTA to assign the exact number of buses to the exact routes described in the computation of this needed expansion capacity. The MTA retains the discretion to schedule the additional capacity in an optimum manner to meet the 1.35 and 1.25 load factor targets. If the MTA can establish at some future date that its remedial steps have successfully eliminated the load factor violations (except for *de minimis* or immaterial exceptions) by using fewer than the required number of expansion buses and without significantly reducing service on the transit-dependent lines, the MTA will be free at that

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[13] Again, perfection is not required and the MTA is not being asked to perform the impossible. If the MTA has a sufficient and court-approved remedial plan in place, and can establish that it is taking every reasonable step in its power to execute faithfully this plan, then, for example, the late arrival of additional new buses for reasons beyond the MTA's control would not be considered a violation of the remedial plan. To date, however, the MTA appears to resist any requirement of additional new expansion buses as part of a remedial plan that it has not, in its sole discretion, devised.

point to reassign these additional buses to other purposes consistent with the Consent Decree, such as expanding the Five Year New Service Plan and the Rapid Bus Network.

Therefore, in response to the MTA's Motion for Clarification and Modification, paragraph 6 of the Remedial Plan set forth in the March 6 Order has been revised in accordance with the modifications and clarifications described above. *See* p. 29, *infra*. All other paragraphs in the Remedial Plan remain in effect as described in the March 6 Order. The MTA's petition to withdraw paragraph 7 is denied for the reasons set forth *infra* at pp. 26-27.

ANALYSIS AND FINDINGS

I. Authority to Issue Remedial Orders

The MTA's most surprising new argument is its contention that the Consent Decree does not authorize the Special Master to issue remedial orders for established violations of the Decree, except to resolve "(1) whether the targets have been met, or (2) whether sufficient funds have been reprogrammed to meet the next target." MTA Motion at 12, *citing* Consent Decree at Section II.A.4. (emphasis omitted). During oral argument, the MTA's counsel argued emphatically that the Special Master's Section V authority to resolve disputes is, in effect, preempted by the more specific remedial powers outlined in Section II. Tr. at 40-41.

The specific language of the Consent Decree and the Order of Reference suggest otherwise. Section V.B. provides the Special Master with express authority to resolve *any* disputes arising under *any* provision of Sections I through IV of the Decree:

> "Any dispute arising under any provision of Sections I through IV of this Consent Decree in which the JWG has a role shall initially be addressed by the JWG. If the JWG cannot resolve the matter, or if the JWG does not have a role in the disputed function, this dispute shall be referred to the attorneys to the parties. If the attorneys cannot resolve the matter informally, the attorneys shall refer the matter to the Special Master for resolution, pursuant to procedures set forth by the Special Master. Any matter resolved by or referred to the Special Master may be reviewed by the District Court, along with the recommendations of the Special Master, if any, upon motion by either of the parties."

The MTA's load factor obligations which are the subject of the Special Master's March 6 Memorandum Decision are specified in Section II of the Consent Decree. Consequently, if the JWG and the attorneys cannot resolve disputes concerning how to remedy violations of those provisions relating to load factor compliance, the matter "shall" be referred to the Special Master for resolution pursuant to Section V.

The remedial powers described in Section II.A.4 are fully consistent with the Special Master's dispute resolution authority found in Section V. Well-established canons of contract interpretation, embodied in California law, provide that the "whole of a contract is to be taken

together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Reading these two sections together, and giving effect to each, it is clear that the Section II remedial powers authorizing the Special Master to determine whether MTA funds must be reprogrammed *supplements*, rather than excludes, the Special Master's Section V power to issue remedial orders resolving disputes under the Decree.

The Order of Reference further reinforces the Special Master's authority to issue remedial orders. It expressly states that "[i]f the attorneys for the parties cannot resolve matters informally pursuant to the Consent Decree, the attorneys shall refer the matter to the Special Master for resolution, pursuant to procedures set forth by the Special Master." Order of Reference, ¶ 4. This delegation of power is consistent with Federal Rule of Civil Procedure 53(c), which allows an order of reference to specify the master's powers and provides that "[s]ubject to the specifications and limitations stated in the order [of reference], the master has and shall exercise the power to . . . take all measure necessary or proper for the efficient performance of the master's duties under the order." Fed. R. Civ. P. 53(c). In fact, where there is a conflict between the Consent Decree and Rule 53, the parties have specifically agreed that the Consent Decree "shall govern." Order of Reference at ¶ 5.

But even assuming *arguendo* that the language of the Decree or the Order of Reference were somehow ambiguous on this point, the extrinsic evidence of the parties' intent compels the same conclusion concerning the question of the Special Master's authority. In interpreting

ambiguous contracts, courts often look to the post-contract conduct to infer the parties' intent. *See Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11 (1994) (post-agreement conduct may be used to resolve ambiguities in contracts).[14] As the Plaintiffs have pointed out, the MTA's prior conduct in these proceedings reflects an explicit recognition of the Special Master's authority to resolve disputes and compel the parties to act when necessary. Most notably, in July 1998, the MTA filed a motion asking the Special Master to exercise his dispute resolution authority and prohibit the Plaintiffs from organizing a "no seat, no fare" strike. The

MTA cited to the Special Master's powers under Section V.B. of the Consent Decree and concluded the following:

> "Here, the Special Master was appointed to monitor the parties' compliance with, and resolve any disputes arising under, the Consent Decree. (Consent Decree, §V.) The Consent Decree does not impose any limitations on the Special Master's powers or authorities to effectuate these objectives. Accordingly, *the Special Master has the inherent authority to issue orders and resolve disputes* raising under the Consent Decree."

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[14] Indeed, the MTA recognized this principle in its March 23, 1999 Opening Brief re Five Year Plan ("When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about[,] the courts should enforce that intent." *Id.* at 2 n. 2, citations omitted).

MTA Letter-brief to Special Master (dated July 30, 1998) at 5 (emphasis added)[15]. This consensus regarding the Special Master's authority has similarly governed the resolution of various other implementation issues, including the Night Owl Service. AR Tab 2. Thus, the post-Consent Decree conduct of both parties reaffirms that they envisioned and expected the Special Master to resolve disputes and issue orders governing the parties' future conduct.[16]

Taking another tack, the MTA attempts to nullify the Special Master's agreed-upon authority by misreading Section II.A.3. of the Decree, which provides that the MTA initially has the discretion to determine how to meet the load factor requirements. The MTA contends that under this provision it is the sole arbiter of how to remedy its own violations.

The MTA was fully afforded the initial discretion contemplated by Section II.A.3. From 1996 to the present, the MTA, in its sole discretion, decided what steps to take to comply with the Decree. Those steps, however, have

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[15] This position was reaffirmed by the MTA in its Reply Brief (dated Aug. 9, 1998) on this same issue.

[16] In a similar vein, the plaintiffs argue that the doctrine of judicial estoppel precludes the MTA from raising any objection to the Special Master's authority. This doctrine is often invoked, both in judicial and administrative contexts, to prohibit a party from unfairly gaining an advantage by taking one position and then subsequently taking an incompatible position. *See, e.g., Yanez v. United States*, 989 F.2d 323 (9th Cir. 1993); *Rissetto v. Plumbers & Steamfitters Local* 343, 94 F.3d 597 (9th Cir. 1996).

been shown to be insufficient.[17] Both the JWG and the parties' attorneys, with the support of the Special Master, have attempted repeatedly to come up with a joint solution to the load factor violations. Having failed in this effort, the parties have submitted this dispute to the Special Master pursuant to Section V of the Decree.

Finally, the MTA continues its challenge to the Special Master's authority by advancing two separate, but interrelated, arguments: (1) that the Special Master has "not been granted the authority to control the operation of the MTA or to order how the target load factors are to be achieved"; and (2) that "even absent the specific restrictions contained in the language of the Consent Decree, . . . the Special Master must carefully consider the fiscal impact of his recommendations and exercise great

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[17] Pursuant to the Special Master's legal guidance, both the MTA and the BRU found that the MTA failed to meet the load factor targets on 75 out of the 79 lines monitored. AR Tabs 36, 37. In its motion and oral argument, the MTA attempts to backtrack on these issues, stating that in admitting noncompliance, it had reserved its right to appeal the legal standard beyond the deadline set by the Special Master, that the load factor targets are merely goals and not an enforceable "ceiling" and that "substantial" compliance on a system-wide basis, as opposed to line-by-line compliance, is all that is needed. It should be noted for the record that, in admitting to the load factor violations, the MTA did submit to the Special Master a document seeking to reserve its rights to appeal certain issues. AR Tab 36. However, this document only purported to reserve the MTA's rights to appeal (1) the deadlines for appealing the August 25 Order, (2) the propriety of granting reconsideration, (3) the "sliding" 20-minute issue, and (4) the deletion of the *de minimis* references on reconsideration. *Id.*

deference to the MTA's own analysis and conclusions." MTA Motion at 6, 11.

Both contentions are founded on a misunderstanding of the role and the decisions of the Special Master. The parties expressly agreed to abide by a set of procedures to resolve disputes. Consistent with his obligation to "resolve" disputes arising under the Consent Decree, the Special Master has sought to limit interference with the MTA's control of its operations and to defer, as much as possible, to the MTA's decisionmaking and funding responsibilities. *See* Tr. at 78-82. Any party dissatisfied with the factual or legal accuracy of the Special Master's decisions can appeal these decisions directly and immediately to the District Court. Although not a perfect analogy, these procedures are akin to voluntary, binding dispute resolution subject to appeal. There can be no issue of improper "control" in this context.[18]

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[18] The case law upon which the MTA relies in this context is likewise inapposite. Both *Hoptowit v. Ray*, 682 F.2d 1237, 1263 (9th Cir. 1982), and *National Organization for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 542 (9th Cir. 1987) involved court-mandated (as opposed to stipulated) special masters. These cases stand for the unremarkable – and wholly unrelated – proposition that Rule 53 does not authorize a court to place involuntarily a special master in control of a defendant in order to force compliance with court orders. Here, the consensual nature of the appointment and the agreed upon dispute resolution procedures, coupled with the ability to seek review in the district court, eliminates any question of improper control.

More significantly, the March 6 Memorandum Decision does not seek to impose "control" over the daily operations or decisionmaking powers of the MTA. It simply sets forth the actions that are necessary to remedy the MTA's noncompliance

Indeed, for more than two and a half years, the parties and the Special Master have operated under this understanding of the Decree and have resolved several issues pursuant to these procedures. In the first instance, the Special Master has consistently deferred to the MTA on how to comply with the Decree. Where this has failed, he has encouraged the JWG and outside counsel to resolve disputes that have arisen. Only when these efforts have failed has the Special Master taken steps to resolve concrete remedial issues as required under Section V.B. The MTA has participated in these proceedings at each stage and, consequently, cannot now claim surprise concerning the purpose or effect of this Stage II proceeding.[19]

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with the Consent Decree. *That* the MTA must purchase more buses in order to meet the requirements of the Decree is not a question of control. The March 6 Decision leaves it up to the MTA to decide *how* to procure the buses, how to schedule the additional capacity, how to provide the operators, mechanics and other needed support and how to institute the other policies and practices necessary to integrate these expansion buses into the MTA's fleet.

[19] The MTA further argues that the recommendations made by the Special Master in the March 6 Memorandum Decision are the functional equivalent of a mandatory injunction issued without notice. MTA Motion at 23. This argument again ignores the critical fact that the dispute resolution procedures were agreed upon by the parties, and that the MTA has always been on notice that the present Stage II proceedings were directed towards remedial issues. *See, e.g.*, September 8, 1998 letter to Special Master from MTA, Attach. A ("the MTA will not be able to make an informed decision as to whether the Special Master's Order of August 25 should be appealed until it knows the *scope and nature of the remedy* that will be implemented as a result of that Order.") (AR Tab 36).

For the same reasons, the MTA's demand for total institutional "deference" is misplaced. As stated earlier, the initial deference afforded the MTA by Section II.A.3 does not grant the agency sole and unfettered authority to watch over and remedy its own violations. MTA's interpretation is wholly at odds with the dispute resolution procedures agreed to in Section V.B. and the Special Master's Order of Reference. Nor do the cases cited by the MTA offer any support for any heightened deference under these circumstances. Both *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956 (2d Cir. 1983) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) deal primarily with the issue of what standards should be used in determining whether *modification* of a consent decree is appropriate. That issue is not before us here.[20]

II. Standards For Compliance With Load Factor Requirements

The MTA contends in its Motion that the March 6 Order violated the standard canons of contract construction by reading the terms of the Decree too literally and

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[20] The MTA also relies without success on *Youngsberg v. Romero*, 457 U.S. 307 (1982). In *Youngsberg*, the Court held that state facilities are constitutionally required only to exercise "professional judgment" in instituting policies and programs and explained that "[it] is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." *Id.* at 321. The MTA cannot rely on *Youngsberg* because, as the March 6 Memorandum Decision made clear, the MTA's remedial plan does not represent a professionally acceptable choice for remedying the load factor violations caused by insufficient capacity.

by failing to apply a "substantial compliance" standard in interpreting the Decree's requirements. MTA's Motion at 13-16. In essence, the MTA argues for a wholesale revision of the Special Master's previous Orders concerning the legal interpretation of the load factor requirements.[21]

Having reviewed the language of the Consent Decree, the MTA's arguments and my prior Orders, I continue to find that the standards enunciated in previous Orders are fully in keeping with the MTA's repeated admonitions that the meaning of a contract is to be gleaned from the language of the writing alone. *See also* Cal. Civ. Code § 1639. As explained in the Special Master's July 15, 1998 and August 25, 1998 Orders, the provisions of Sections II.A.1. and II.A.2. of the Consent Decree unambiguously provide for "the reduction of the maximum load factor *ceiling for all bus routes* from 1.45 to 1.2 in [specified] increments." Consent Decree at 3 (emphasis added). The load factor is to be measured "during *any* 20 minute weekday peak period in the peak direction of travel *on each bus line.*" *Id.* (emphasis added). Under Section II.A.4. "Failure to Meet Targets" specific remedial procedures are triggered "if MTA fails to meet the target load factors for *all* bus lines by the dates

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[21] As a preliminary matter, it is worth noting that the MTA's attempt to revisit the standards of compliance comes over six months after the Special Master's July 15, 1998 and August 25, 1998 Orders relating to the compliance standards. Although I have nonetheless considered again the MTA's legal arguments in the present Motion, the MTA's delay in asserting its specific objections to the standards enunciated in these Orders violates the procedures that have been established to ensure efficient and fair resolution of disputes under the Decree.

specified." Contrary to the MTA's contention, the Special Master's "literal" interpretation of this express language is not inconsistent with any other provisions of the Decree, or with the broader purpose of improving transportation conditions for the transit-dependent.

Additionally, the standard of "substantial compliance" referenced in Section VIII of the Consent Decree does not qualify the specific performance requirements described in Section II. Rather, this standard is limited to the context in which it is found; it is applicable only to a petition by the MTA to be released from the obligations of the Decree, subject to certain conditions, after seven years. Otherwise, the precise load factor targets established by the Decree would be rendered virtually meaningless.

III. Effect On Other Statutory Obligations

The MTA further argues that implementation of the Special Master's March 6 Order would force the MTA into a Hobbesian choice between complying either with the Decision or MTA's other statutory obligations. MTA Motion at 16-23. In connection with this argument, the MTA identifies various state and federal funding limitations, as well as several environmental statutes, which it contends might be violated if it were to implement the March 6 Order. *Id.*

In the intervening two and a half years since the Consent Decree was signed, the MTA has had ample signs (through preliminary point check data) that additional bus capacity was needed to meet the upcoming

load factor targets. Although the MTA is to be commended for approving on its own initiative an ambitious and accelerated bus *replacement* plan to retire the agency's hundreds of over-age buses, the fact remains that *expansion* buses beyond these replacement buses are also required to remedy the load factor violations caused by the MTA's insufficient capacity. The fact that the MTA has not adequately prepared for this contingency is not an excuse to delay further (much less excuse altogether) the implementation of the Decree.

Regardless of the cause of the present difficulties, however, the MTA does not demonstrate specifically how the March 6 Order would compel the MTA to violate any statutory obligations. In the MTA's May 4, 1998 draft Restructuring Plan, the MTA identifies the many funding sources for which bus capital and/or operating costs are eligible. AR Tab 81 at 42-43. For many of these bus-eligible funding categories, no funds at all have been allocated to buses. *See generally* Declaration of Thomas A. Rubin (dated April 29, 1998) ("Rubin Decl.") ¶¶ 27-63 (noting that the MTA has not applied for, allocated or obtained maximum bus funding under various federal, state and local funding sources including Sections 5307, 5309 and Proposition C Funds). Thus, the fact that the MTA apparently has not applied for, allocated or received these bus-eligible funds somewhat undercuts the MTA's argument that it will be forced to tap already-committed funds, and therefore violate its other statutory obligations, to comply with the Decree.[22]

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[22] During the oral argument and in his declaration, the MTA CEO Julian Burke vigorously set forth the substantial

Focusing on its other obligations, however, does not relieve the MTA from its obligation under the Decree to make bus operations its *first* priority:

> "consistent with other statutory responsibilities and obligations, MTA's first priority for the use of bus-eligible funds realized in excess of funds already budgeted [in October, 1996] for other purposes shall be to improve bus service for the transit-dependent by implementing MTA's obligations pursuant to this Consent Decree."

Consent Decree § I.F.[23] As a practical and contractual matter, the allocation of sufficient resources to halt the deterioration of bus service to the MTA's most frequent daily customers – the transit-dependent of Los Angeles – should take precedence over the funding of new transit alternatives, even those designed to attract new transit patrons. This is what the Consent Decree requires.

Moreover, despite Mr. Yale's general inventory of the many, varied and substantial sources of MTA funding, some of which are restricted to specific purposes, the MTA does not specifically show how its long-range budget, with careful and advance planning, cannot accommodate the expenditures required to comply with the March

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financial challenges that the remedial plan creates for the MTA in the context of an agency that has accomplished much in recent months to put its financial house in order. However, Mr. Burke did not contend that it was impossible to identify funding to comply with the remedial plan; his primary concern was with the *operational* costs of an expanded bus fleet. Tr. at 65-72.

[23] If sufficient funding is not provided, Section I.F. further provides that "the matter shall be addressed in accordance with the procedures set forth in this Consent Decree."

6 Decision as modified by this Order. On the contrary, the November 11, 1998 Regional Transportation Alternatives Analysis ("RTAA") concluded that as a result of suspended rail projects and expanded funding sources, the MTA is expected to have approximately $1.4 billion in funds available between FY99 and FY04. While there are, of course, other important projects that call for the use of these funds, the fact remains that, on this record, the MTA has not shown why some of these funds could not be used to fund or to secure the funding of the expansion buses required by the Remedial Plan.[24]

The MTA expresses the further concern that environmental statutes may pose obstacles to the implementation of the March 6 Memorandum Decision. Statutory obligations such as the National Environmental Policy Act (NEPA), the National Ambient Air Quality Standards (NAAQS) and the California Environmental Quality Act (CEQA) have always been an important consideration in planning any transportation project in California. Generally, adding additional bus capacity to improve service quantity should contribute positively to environmental quality. If despite the MTA's good faith efforts to implement an approved remedial plan there are unavoidable

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[24] Taking into account various demands on these funds, the RTAA concludes that during the FY99-04 timeframe there will be $593.9 million in available funding which, after taking out $267.1 million which the RTAA recommends should be expended on the Rapid Bus Program, still leaves $326.8 million available. The RTAA finds even more funding available between FY99-FY 10 ($2.4 billion available). *See* AR Tab 104 at 28.

delays in complying with statutory requirements, these issues should be addressed in the quarterly reports.

IV. Line By Line Modifications

As the Plaintiffs acknowledge, because the Special Master is authorized by the provisions of the Consent Decree to establish separate procedures for adjudicating disputes between the parties, the present motion is not necessarily governed by the Central District Local Rules on motions for reconsideration.[25] Nonetheless, the standards for such motions are instructive. Central District Local Rule 7.16 provides:

> "A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court . . . , or (b) the emergence of new material facts or a change of law . . . , or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. . . . "

With this standard in mind, I have reviewed the declarations and supplementary evidence provided by the MTA as well as the declarations submitted by the Plaintiffs. The MTA contends that there are two ways in which it can reduce the number of buses required to cover the additional bus trips found to be necessary by the March 6 Memorandum Decision. MTA Motion at 32-33; *see also* Declaration of Dana Woodbury (dated April

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[25] Although not titled as such, the MTA's Motion clearly seeks reconsideration of the March 6 Memorandum Decision.

15, 1999) ("Woodbury Decl.") at ¶¶ 7, 10-11. First, the MTA asserts that 28 buses can be eliminated from the Special Master's calculations by matching trips to location and direction because, in some instances, one bus can provide more than one needed trip. Woodbury Decl. ¶ 10. Second, the MTA contends that additional use of advanced scheduling techniques can further decrease the number of buses required by 64 buses. *Id.* ¶ 11.

Addressing first the MTA's argument concerning the advanced scheduling techniques, I find that the MTA has not established that the additional use of these techniques is an appropriate Basis upon which to reduce the number of expansion buses that are necessary to remedy load factor violations attributable to insufficient capacity. The March 6 Decision already took into account the use of advanced scheduling techniques such as interlining, shortlining and deadheading, when such techniques do not adversely affect the transit-dependent by reducing the level of service on other bus lines, in crafting a remedial plan that found fewer buses to be necessary than proposed by the BRU.

The supplementary evidence provided by the MTA in its present motion does not support a further reduction. The raw and largely unexplained headway sheets provided by the MTA to supplement the Administrative Record do not show completely the interrelationship off the affected bus lines, nor do they establish that the altered headways and schedules will not adversely affect

other service.[26] While counsel for the MTA very effectively explained at oral argument how these techniques would apply to several specific lines (Tr. at 51-57), the fact remains that these schedules were prepared as an exercise to show theoretically how the MTA could cover additional trips without buying expansion buses. As such, the techniques appear to involve somewhat contorted schedules that target specific violations rather than optimizing the use of the bus fleet for the benefit of riders. Indeed, one schedule maker attached a note to the scheduling sheets stating that "[i]n reality, we probably would have the trips work westbound instead of off-routing [deadheading]," suggesting that the theoretical reductions might not be practical. Second Supplemental AR at 165. *See* Declaration of Ted Robertson (dated May 1, 1998) ("Robertson Decl.") ¶ 16; *see also id.* ¶¶ 14-19. As explained by counsel, some of the interline and short run schedules involve the use of expansion buses on more than one line; however, the MTA does not indicate how many expansion buses would be required for this purpose and where and when the MTA plans to obtain these buses. Given the rigorous standard normally applicable to motions for reconsideration, there is no basis to find that these additional data justify reopening the Special Master's March 6 Decision limiting the application of

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[26] Other than the general explanation offered in the Declaration of Dana Woodbury, the two volumes of supplementary evidence come unaccompanied by any declaration providing a line by line account of how these techniques would work. Moreover, they were submitted for the record without having been first provided to the Plaintiffs and their experts for review. Tr. at 102.

advanced scheduling techniques in the design of a remedial plan.[27]

On the other hand, the MTA's trip-linking proposal described in the Woodbury Declaration does satisfy this requirement. Table 2 attached to the Woodbury Declaration illustrates graphically how various bus trips found to be necessary by the March 6 Decision can be linked with a single bus, thereby reducing the number of buses required. I am satisfied that this technique improves upon and refines the factual findings of the March 6 Decision in a manner fully consistent with the purpose of the Consent Decree. Attached as Exhibit A to this Order are my line by line modifications to the March 6 Order based on the use of this technique.

Several important caveats to these modifications should be noted.

First, the Woodbury Declaration excludes from the analysis and computation any time period for which the

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[27] It bears repeating that the relevant issue in this Stage II proceeding is this: Based on the Administrative Record, how many expansion buses (or vehicular equivalents) are needed to remedy the load factor violations attributable to insufficient capacity? The Remedial Plan does not dictate to the MTA how these buses should be scheduled. It is assumed that, in scheduling this additional capacity, the MTA will utilize its experienced schedule makers to optimize both the efficient use of these buses and the benefits to the transit-dependent. If the MTA is able to meet the load factor targets without utilizing all the expansion buses required, it would be free at that point to use the buses to improve service to the transit-dependent through an expansion of the Five Year New Service Plan, the Rapid Bus Expansion Network or other projects.

Special Master added trips based on violations for which the cause had not at that time been analyzed.[28] Thus, for these lines, the MTA's calculation of the number of buses required is understated.[29] At the request of the MTA, however, I have revisited my calculations concerning these violations. Since I have found, based on the Administrative Record, that approximately half of the load factor violations are attributable to insufficient capacity, the March 6 Order added bus trips for some (but not all) unanalyzed violations, predominantly on lines where a substantial number of violations occurred repeatedly and recently. I continue to find that this methodology is rooted firmly in an accurate and realistic assessment of the extent of the MTA's load factor violations. Having reviewed my previous findings, however, I now find that, of the buses added by the March 6 Order as a result of unanalyzed violations, six buses were added for violations that did not occur with sufficient frequency or that occurred primarily in the early months of the compliance period. Exhibit B to this Order presents my modified findings in this regard.

Second, the calculations in Table 2 attached to the Woodbury Declaration understate the total number of

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[28] *See, e.g.*, Woodbury Decl., Exh. D, Bus Lines 16, 20, 110, 111.

[29] For example, Line 420 exhibited repeated and recent violations between 6:40 a.m. and 7:40 a.m. and between 8:00 a.m. and 8:40 a.m., for which the Special Master required three additional buses. The Woodbury declaration recommends 0 buses for this line on the ground that the violations were not analyzed.

buses required by failing to add trips for violations occurring in the 8:40 – 9:00 a.m. time period. Contrary to the MTA's contentions, Lines 2, 70 and 78 do in fact exhibit violations in this period. For example, Line 2 had four "insufficient capacity" violations during the 8:00 a.m. – 8:19 a.m. time period (8:03 a.m., 8:09 a.m., 8:14 a.m., 8:14 a.m.), two recent unanalyzed violations occurring at 8:27 a.m. and 8:31 a.m., and two other "insufficient capacity" violations occurring at 8:35 a.m. and 8:36 a.m. Since the time of the violation in the Plaintiffs' mapping data indicates the first minute of the twenty-minute violation, the 8:35 a.m. and 8:36 a.m. violations reflect conditions of overcrowding from 8:35 a.m. through 8:56 a.m.[30] Thus, it is proper to add bus trips for this last time period.

Finally, it is important to point out that, for numerous lines, the Woodbury methodology (by acknowledging that violations can occur in different directions and route segments) actually identifies more necessary bus trips, and in some cases concludes that *more* buses are required, than found to be necessary in the March 6 Memorandum Decision.[31] This shows that in certain instances the Special Master understated the number of additional bus trips required on certain lines and may have correspondingly understated the number of buses required to remedy violations on these lines. Nonetheless, I have not

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[30] Similarly, Line 70 had seven violations starting in the 8:20-8:39 a.m. time period, including violations starting at 8:33 a.m. and 8:36 a.m. which span almost to the end of the 9:00 a.m. hour.

[31] For example, for Line 1, Woodbury's methodology of linking trips concludes that eight buses are required for this line, although the Special Master only ordered five.

increased the number of buses required or otherwise modified my findings for those lines even where the MTA's numbers may be greater.

V. Requirement of 102 Buses

The MTA's Motion also requests reconsideration of that portion of the March 6 Decision which directed the MTA to purchase an additional 102 buses pursuant to Section II.B. of the Decree. MTA Motion at 24-26. The MTA argues that the Consent Decree does not require that the 102 buses be *new* buses. *Id.*

The MTA's arguments on reconsideration are identical to its arguments offered earlier, and fail for the same reasons. In previous rulings and in the March 6 Memorandum Decision, I have explained how the MTA has only temporarily met the requirement of Section II.B. by extending the life of buses scheduled for replacement. I have also indicated previously that eventually the MTA would have to retire these replacement buses and obtain 102 new buses to satisfy this requirement. The MTA does not provide any new basis or argument to amend this conclusion. These expansion buses may be used by the MTA for any purpose that improves bus service for the transit-dependent.

VI. Procurement of Temporary Buses.

The MTA argues that it cannot lease or otherwise procure the 277 temporary buses specified in the March 6 Memorandum Decision-because there are virtually no new CNG buses available for lease. MTA Motion at 33-34.

While this may be true, the March 6 Memorandum Decision did *not* require that the temporary buses be new or CNG. The Decision stated that in order to achieve compliance with the Decree, the MTA should "obtain, through lease or other means, 277 buses on a temporary basis to meet the 1.35 LFT as soon as possible until the new purchased buses arrive." *Id.* at 55. The MTA has the discretion to determine what types of vehicles it can obtain for this purpose. Moreover, since the present Order reduces the number of buses necessary to comply with the 1.35 LIFT from 277 to 248 (not counting spares), the number of temporary buses needed is also reduced to 248.

VII. Summary of Modifications to the March 6 Order

As stated above, the modifications to the specific line by line findings made in the March 6 Order are attached hereto as Exhibits A and B. To summarize these findings, the 277 buses found to be necessary by the March 6 Decision to meet the 1.35 load factor requirements are hereby reduced by 29 buses (23-bus reduction in Exhibit A, 6 bus reduction in Exhibit B), for a total of 248 buses. Applying this ratio of reduction to the 1.25 load factor target, I find that the number of additional buses required for this next standard is reduced from 126 to 113. Adding the standard spare ratio of 20%, and subtracting the 53 additional buses already planned, the total number of buses required to meet the 1.35 and 1.25 load factor targets equals 379 additional buses.

In sum, 379 new buses are necessary to expand the fleet size to remedy the load factor violations attributable

to insufficient capacity and 102 new buses are necessary to meet the MTA's obligation under Section II.B. of the Consent Decree to expand bus services for the transit-dependent. With respect to that half of the load factor violations attributable to "missing buses," the MTA has in place a comprehensive and sufficient plan, including an accelerated bus replacement schedule and related remedies. While this program to accelerate the replacement of buses that are over 12 years old/500,000 miles will contribute greatly to the improvement in the quality of bus service, it is not enough. Additional capacity is needed to meet the requirements of the Consent Decree.

The MTA's Motion for Clarification and Modification is granted in part and denied in part. Paragraph 6 of the March 6 Order is hereby modified as follows, together and consistent with all of the findings and conclusions expressed in the present Memorandum Decision and Order. Except insofar as it has been modified or clarified by this Decision, the March 6 Memorandum Decision and Order remains in effect. The motions, briefs, declarations, and exhibits submitted by the parties, including amicus curiae, shall be admitted into the Administrative Record. The parties shall have twenty (20) days from the date of this Order to file a motion before Chief Judge Terry J. Hatter, Jr. seeking review of this Memorandum Decision and Order and the March 6 Memorandum Decision and Order.

MODIFIED PARAGRAPH 6

6. *Remedy violations attributable to insufficient capacity.*

In order to achieve compliance with the Consent Decree, the MTA should:

(a) purchase 379 new buses to provide the additional capacity required to reduce the load factor target to 1.35 as soon as possible and to meet the 1.25 load factor target by June 2000, which includes:

(1) 248 buses to add trips to the lines with "insufficient capacity" violations to meet the 1.35 LFT;

(2) 49 spares (20% of 248[rounded down]);*

(3) 113 buses to meet the 1.25 LFT; and

(4) 22 spares (20% of 113[rounded down]);* minus

(5) 53 expansion buses already planned by MTA for purchase.

(b) hire additional full-time operators to operate the new service, as required;

(c) hire additional mechanics as needed to meet the new service requirements;

and

(d) obtain, through lease or other means, 248 buses on a temporary basis to meet the 1.35 load factor target as soon as possible until the new purchased buses arrive.

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* *See* footnote 7, *supra.*

Although the determination of the number of additional buses that are required to reduce load factor violations attributable to insufficient capacity is based in substantial part on a line-by-line analysis of the causes of the violations during 1998, the MTA has the flexibility to schedule its service in a way that will maximize the efficiency of the fleet and will enable the MTA to meet the load factor targets as quickly and cost-effectively as possible. While meeting this objective may require some adjustment of schedules and some utilization of scheduling techniques, the MTA should not significantly reduce service to the transit-dependent in order to meet the load factor targets on the specified routes.

IT IS SO ORDERED.

/s/ Donald T. Bliss
SPECIAL MASTER

Dated: May 14, 1999

EXHIBIT A

Applying the methodologies described in the March 6 Memorandum Decision as modified by the May 14, 1999 Order, the line by line findings made in the March 6 Memorandum Decision are modified as follows:

(13) *Line 38.*

Line 38 has exhibited insufficient capacity violations between 6:00-8:40 A.M. The Special Master previously found in the March 6 Memorandum Decision that eight buses are needed to bring this line into compliance with

the 1.35 load factor target. Based on the Woodbury Declaration, I find that two trips can be linked on the Jefferson Eastbound segment by one bus, thereby reducing the number of additional buses required for this line to *seven*.

(17) *Line 55.*

Line 55 has exhibited insufficient capacity violations between 6:20-9:00 A.M. The Special Master previously found in the March 6 Memorandum Decision that eight buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that four of the eight additional trips can be linked on the Adams Westbound segment by two buses, thereby reducing the number of additional buses required for this line to *six*.

(19) *Line 66.*

Line 66 has exhibited insufficient capacity violations between 6:00-9:00 A.M. The Special Master previously found in the March 6 Memorandum Decision that nine buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that six of the nine additional trips can be linked on the Ninth St. Eastbound segment by three buses, thereby reducing the number of additional buses required for this line to *six*.

(20) *Line 68.*

Line 68 has exhibited insufficient capacity violations between 6:00-9:00 A.M. The Special Master previously found in the March 6 Memorandum Decision that nine buses are needed to bring this line into compliance with

the 1.35 load factor target. Based on the Woodbury Declaration, I find that six of the nine additional trips can be linked on the Washington Eastbound segment by three buses, thereby reducing the number of additional buses required for this line to *six*.

(24) *Line 81.*

Line 81 has exhibited insufficient capacity violations between 6:00-6:20 A.M. and 6:40-8:40 A.M. The Special Master previously found in the March 6 Memorandum Decision that seven buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that several trips can be linked on the Figueroa Northbound and N. Figueroa Southbound segments, thereby reducing the number of additional buses required for this line to *six*.

(27) *Line 105.*

Line 105 has exhibited insufficient capacity violations (and/or repeated and recent unanalyzed violations) between 6:20-7:00 A.M., 7:20-7:40 A.M. and 8:00-8:40 A.M. The Special Master previously found in the March 6 Memorandum Decision that four buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that two out of four additional trips can be linked on Vernon Westbound segment by one bus, thereby reducing the number of additional buses required for this line to *three*.

(28) *Line 108.*

Line 108 has exhibited insufficient capacity violations (and/or repeated and recent unanalyzed violations) between 6:00-7:40 A.M. and 8:00-8:20 A.M. The Special

Master previously found in the March 6 Memorandum Decision that six buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that four of the six additional trips can be linked on the Slauson Eastbound segment by two buses, thereby reducing the number of additional buses required for this line to *four.*

(33) *Line 163.*

Line 163 has exhibited insufficient capacity violations between 6:20-7:20 A.M. and 7:40-8:00 A.M. The Special Master previously found in the March 6 Memorandum Decision that four buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that two of the four additional trips can be linked on the Sherman Way Westbound segment by one bus, thereby reducing the number of additional buses required for this line to *three.*

(37) *Line 180.*

Line 180 has exhibited insufficient capacity violations between 6:00-6:20 A.M. and 6:40-8:20 A.M. The Special Master previously found in the March 6 Memorandum Decision that six buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that two of the six additional trips can be linked on the Vermont Northbound segment by one bus, thereby reducing the number of additional buses required for this line to *five.*

(41). *Line 206.*

Line 206 has exhibited insufficient capacity violations between 6:00-9:00 A.M. The Special Master previously

found in the March 6 Memorandum Decision that nine buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that two of the nine additional trips can be linked on the Normandie Northbound segment by one bus, thereby reducing the number of additional buses required for this line to *eight*.

(42) *Line 207.*

Line 207 has exhibited insufficient capacity violations between 6:20-9:00 A.M. The Special Master previously found in the March 6 Memorandum Decision that eight buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that two of the eight additional trips can be linked on the Western Northbound segment by one bus, thereby reducing the number of additional buses required for this line to *seven*.

(44) *Line 212.*

Line 212 has exhibited insufficient capacity violations between 6:00-7:40 A.M. and 8:00-8:40 A.M. The Special Master previously found in the March 6 Memorandum Decision that seven buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that four of the seven additional trips can be linked on the La Brea Northbound segment by two buses, thereby reducing the number of additional buses required for this line to *five*.

(48) *Line 243.*

Line 243 has exhibited insufficient capacity violations between 6:00-8:00 A.M. The Special Master previously

found in the March 6 Memorandum Decision that five buses (servicing six trips) are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that four of the six additional trips can be linked on the De Soto Northbound segment by two buses, thereby reducing the number of additional buses required for this line to *four.*

(49) *Line 251.*

Line 251 has exhibited insufficient capacity violations between 6:40-8:40 A.M. and 3:00-5:40 P.M. The Special Master previously found in the March 6 Memorandum Decision that seven buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that four of the seven additional trips can be linked on the Soto Southbound segment by two buses, thereby reducing the number of additional buses required for this line to *five.*

(53) *Line 424.*

Line 424 has exhibited insufficient capacity violations between 6:00-6:40 and 8:00-8:40 A.M. The Special Master previously found in the March 6 Memorandum Decision that four buses are needed to bring this line into compliance with the 1.35 load factor target. Based on the Woodbury Declaration, I find that two of the four additional trips can be linked on the Ventura Westbound segment by one bus, thereby reducing the number of additional buses required for this line to *three.*

EXHIBIT B

As explained in the March 6 Memorandum Decision and in the present Order, the load factor data compiled by the parties reflect numerous violations on various lines for which, for one reason or another, the cause of the violation could not be properly ascertained. To deal with this gap in the data, the Special Master found that, since approximately one-half of all the load factor violations are attributable to "insufficient capacity," time periods reflecting multiple and recent "unanalyzed violations" will require additional buses to remedy these violations.

Having factually reevaluated my analysis of those lines exhibiting load factor violations unanalyzed for cause, I hereby amend the findings of the March 6 Memorandum Decision:

(6) *Line 16.*

The Special Master previously found in the March 6 Memorandum Decision that Line 16 has exhibited insufficient capacity or multiple and recent unanalyzed violations between 6:20-7:40 A.M., and that four buses are needed to bring this line into compliance with the 1.35 load factor target. Upon reconsideration, I find that there were no insufficient capacity violations and only one recent unanalyzed violation which occurred in the 7:20 a.m. – 7:40 a.m. time frame. Accordingly, I am reducing my previous findings by one bus trip and hereby finding that *three* additional buses are needed for this line.

(7) *Line 18.*

The Special Master previously found in the March 6 Memorandum Decision that Line 18 has exhibited insufficient capacity or multiple and recent unanalyzed violations between 6:00-7:40 and 8:00-8:40 A.M., and that seven buses are needed to bring this line into compliance with the 1.35 load factor target. Upon reconsideration, I find that there were no insufficient capacity violations and only one recent unanalyzed violation occurring in the 8:00 a.m. – 8:20 a.m. time frame. Accordingly, I am reducing my previous findings by one bus trip and hereby finding that six additional buses are needed for this line.

(9) *Line 26.*

The Special Master previously found in the March 6 Memorandum Decision that Line 26 has exhibited insufficient capacity or multiple and recent unanalyzed violations between 6:00-8:00 A.M., and that four buses are needed to bring this line into compliance with the 1.35 load factor target. Upon reconsideration, I find that there were no insufficient capacity violations and only one recent unanalyzed violation occurring in the 7:40 – 8:00 a.m. time frame. Accordingly, I am reducing my previous findings by one bus trip and hereby finding that *three* additional buses are needed for this line.

(27) *Line 105.*

The Special Master previously found in the March 6 Memorandum Decision that Line 105 has exhibited insufficient capacity or multiple and recent unanalyzed violations between 6:20-7:00 A.M., 7:20-7:40 A.M. and 8:00-8:40 A.M., and that four buses are needed to bring this line

into compliance with the 1.35 load factor target. Upon reconsideration, I find that that there were no insufficient capacity violations and only two recent unanalyzed violations occurring in the 8:00 a.m. – 8:20 a.m. time frame. Accordingly, I am reducing my previous findings by one bus trip and hereby finding that *three* additional buses are needed for this line.

(49) *Line 251.*

The Special Master previously found in the March 6 Memorandum Decision that Line 251 has exhibited insufficient capacity or multiple and recent unanalyzed violations between 6:40-9:00 A.M. and 3:00-5:40 P.M., and that seven buses are needed to bring this line into compliance with the 1.35 load factor target. Upon reconsideration, I find that only one *insufficient* capacity violation and one recent unanalyzed violation occurred in the 8:20 a.m. – 9:00 a.m. time periods. Accordingly, I am reducing my previous findings by one bus trip and hereby finding that *six* additional buses are needed for this line.

(56) *Line 522.*

The Special Master previously found in the March 6 Memorandum Decision that Line 522 has exhibited insufficient capacity or multiple and recent unanalyzed violations between 6:20-9:00 A.M., and that eight buses are needed to bring this line into compliance with the 1.35 load factor target. Upon reconsideration, I find that there were no insufficient capacity violations and only two non-recent unanalyzed violations occurring in the 7:40 a.m. – 8:00 a.m. time periods. Accordingly, I am reducing

my previous findings by one bus trip and hereby finding that *seven* additional buses are needed for this line.

PROOF OF SERVICE

The foregoing document described as MEMORANDUM DECISION & ORDER RE: MOTION FOR CLARIFICATION AND MODIFICATION has been served on May 14, 1999, via the United States Postal Service by first-class pre-paid mail in sealed envelopes, to the following parties:

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/s/ Donald T. Bliss
SPECIAL MASTER

APPENDIX F

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

LABOR/COMMUNITY STRATEGY CENTER, et al., Plaintiffs, vs. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY and JOSEPH DREW, etc. Defendants.	CASE NO. CV 94-5936 TJH (MCx) CONSENT DECREE (Filed Oct. 29, 1996) Date: Not Applicable Time: Place:

The Los Angeles County Metropolitan Transportation Authority ("MTA") and the Labor/Community Strategy Center, the Bus Riders Union, the Southern Christian Leadership Conference of Greater Los Angeles, the Korean Immigrant Workers Advocates and other bus riders in Los Angeles County share a strong common

commitment to the improvement of bus service for the transit-dependent populations of Los Angeles County. In furtherance of that commitment, the parties have agreed to settle the litigation, *Labor/Community Strategy Center, et al. v. Los Angeles County Metropolitan Transportation Authority, et al.*, in accordance with the following terms and conditions of this Consent Decree. Attachments A and B shall be deemed to be parts of this Consent Decree and are fully incorporated by reference here.

I. BASIC PRINCIPLES AND OBJECTIVES

A. MTA is fully committed to insuring that all transit patrons in Los Angeles County, without regard to race, color, or national origin, have equal and equitable access to a fully integrated mass transportation system that effectively meets the needs of all riders.

B. In September 1995, the MTA Board adopted as its "highest priority, improvement of the quality of bus service in Los Angeles."

C. MTA shall institute and maintain a policy of charging equitable fares for the provision of transit services.

D. MTA shall institute and maintain a policy of fairly distributing resources devoted to transit security in the form of uniformed officers, improved waiting areas, and other measures, among all classes of service, all modes of transit, and all geographic areas served by MTA.

E. Capital improvement planning and programming for MTA shall include attention to all modes of transportation and all areas of the County from which riders are drawn. Improvements meeting the needs of transit-dependent populations shall be given priority, consistent with MTA's other statutory responsibilities and obligations.

F. "Transit-dependents" are residents of Los Angeles County whose access to automobiles is limited by income, age or disability. Consistent with MTA's other statutory responsibilities and obligations, MTA's first ~~prior~~ [priority /s/ Bliss] for the use of all bus-eligible revenue realized in excess of funds already specifically budgeted for other purposes shall be to improve bus service for the transit-dependent by implementing MTA's obligations pursuant to this Consent Decree. If sufficient funding is not provided to meet the obligations set forth in this Consent Decree, the matter shall be addressed in accordance with the procedures set forth in this Consent Decree.

G. Future MTA long-range plans, major capital projects, and annual budgets shall include a section devoted to the means by which the transit needs of transit-dependent residents are being and shall ~~he~~ [be /s/ Bliss] met. Such section shall address specifically how these principles and objectives are being met.

E. MTA will work with representatives of the plaintiffs' class in implementing these principles and objectives and the Consent Decree. To that end, a Joint Working Group (JWG), described in Section IV, below,

shall be established to provide for cooperation between representatives of the plaintiffs' class and MTA.

II. SERVICE IMPROVEMENTS

A. *Reducing Overcrowding By Adding New Service.*

1. *Improved Performance Goal: Reduced ~~Loan~~* [Load] *Factor Targets.* MTA's performance in meeting this critical objective of responding to consumer demand for bus services efficiently shall be measured by the reduction in levels of crowding on board buses. MTA shall establish as a five-year goal to be reached by the end of the fifth complete fiscal year following the approval of this Consent Decree, the reduction of the maximum load factor ceiling for all bus routes from 1.45 to 1.2 in the following increments ("target load factors"):

December 31, 1997, 1.35

June 30, 2000, 1.25

June 30, 2002, 1.2

Thereafter, MTA shall maintain the 1.2 load factor for the duration of this Consent Decree.

2. *Load Factor Definition.* "Peak load factor" shall mean (total number of passengers/total number of seats) which shall be determined by computing the highest ratio of total number of passengers to total number of seats achieved during any 20 minute weekday peak period in the peak direction of travel on each bus line. This load factor computation would be based on a one hour time interval during non-peak periods. Target load factors shall not be achieved by by-passing passengers at bus

stops. MTA shall conduct ride checks to determine load factors using current MTA procedures and schedules. MTA shall supply the JWG with all such data, including on-board surveys, ride and point checks and passenger surveys, throughout the year, and inform the JWG of any change in data gathering/processing procedures. The JWG may request that MTA collect additional data as appropriate to monitor compliance with the load factor targets.

3. *MTA Plans to Meet Targets.* MTA will plan to make available sufficient additional buses and other vehicles to meet these target load factors. While MTA will have the discretion in determining how the targets will ~~he~~ [be /s/ Bliss] met, MTA will consult with the JWG in formulating and implementing this plan. MTA will prepare at least 90 days prior to the beginning of each fiscal year, and make publicly available, a report setting forth its plan to meet the targets as of the date the report is issued, recognizing that changes in ridership, fares, the economy and other factors may require modifications to the plan. In addition, when MTA makes its scheduled modification to its long range plan it shall incorporate plans to insure the availability and operation of the additional buses and other vehicles required to meet these targets. If ridership shall increase by more than 15 percent on any bus line MTA shall nevertheless make its best efforts to meet the target for that line and the target for that line may be deferred for one (and only one) year. In addition, the JWG will designate a list of bus lines which may be exempted from the load factor reduction requirement, such as lines with low frequency service.

4. *Failure to Meet Targets.* If MTA fails to meet the target load factors for all bus lines by the dates in paragraph 1 above, (except those exempted or deferred under paragraph 3 above), MTA shall meet the target as soon as possible and reallocate sufficient funds from other programs to meet the next lower target load factor as scheduled. The reprogrammed funds, which may include but not be limited to revenues from Propositions A and C discretionary funds, shall be used to meet the target load factors. Any dispute concerning whether the targets have been met; or if the targets have not been met, whether sufficient funds have been reprogrammed to meet the next target will be reviewed by the JWG. ~~If~~ [If /s/ Bliss] the JWG cannot resolve the matter it will be referred to the Special Master. The failure of MTA to meet the target load factors shall not be deemed a changed or unforeseen factual condition for purposes of seeking a modification of this Consent Decree by MTA.

B. *Expanded Bus Service Improvement Program.* MTA shall initiate the bus service improvement program during the remaining months of calendar year 1996 that will result in immediate, visible and tangible benefits in improved bus service for the transit-dependent communities of Los Angeles County, including but not limited to areas in south and east Los Angeles and Pico Union. This program will make available 51 additional buses (*i.e.*, buses in addition to those already planned for replacement purposes) by the end of the calendar year 1996 to reduce overcrowding, initiate new services, and improve mobility and access for transit-dependent riders. Another 51 additional buses (*i.e.*, buses in addition to those already planned for replacement purposes) to reduce

overcrowding will be available by June 30, 1997, for a net of 102 additional buses. Bus service improvement plans that have already been funded by MTA will be implemented expeditiously following the approval of this Consent Decree.

C. *New Bus Service to Facilitate Access To County-wide Job, Education and Health Centers.*

1. MTA shall work with the JWG to develop and implement a plan to provide additional bus service that is designed to improve access by the transit-dependent community to Los ~~Angels~~ [Angeles /s/ Bliss] County-wide educational, employment, and health care centers, as well as enhancing personal mobility throughout the region. See Attachment A. Section IV.A for examples of specific service improvements that could facilitate access to health care centers. Routes to increase service to job and education centers or to add service to existing routes also shall be developed by MTA working with the JWG, as set but in Attachment A, Section IV.3. The parties understand that the addition of these routes must be responsive to sufficient rider demand and economically feasible and that such new routes will be closely monitored and terminated if there is not sufficient customer demand.

2. After consultation with the JWG, MTA will initiate as expeditiously as possible a pilot project to provide a minimum of fifty additional buses (*i.e.*, buses in addition to those buses already planned for replacement purposes) during the next two years to demonstrate how this program can meet the needs of transit-dependent areas

for access to jobs, education and health services. The JWG will evaluate the pilot project and develop a plan for additional bus and other transit services over the following five years, which shall include a projection of the number of buses and other vehicles needed to provide such services. If the JWG cannot agree on a five-year plan by December 31, 1998, the issue may be referred to the Special Master.

D. *Comprehensive Program To Enhance Security, Improve Bus Stops, Increase User-Friendliness, and Improve Bus Service Efficiency For Transit-Dependent Riders* ("*Program*"). A description of the service improvements contained in this Program is provided at Attachment B.

E. *Consultation With Riders in Improving Bus Service to the Transit-Dependent.* Implementation of significant improvements in bus service for the transit-dependent population over the next seven years will require some reallocation of the existing fleet, the procurement of additional buses, a wide variety of service enhancements and other innovative responses as devised by MTA. MTA agrees to work with [the /s/ Bliss] JWG in a spirit of cooperation in achieving the objectives of this Consent Decree. MTA may also work through neighborhood advisory councils in soliciting advice and in evaluating MTA's progress in meeting the principles and objectives. Consultation with the neighborhood advisory councils, however, shall not constitute a part of the monitoring process for insuring compliance with this Consent Decree.

III. FARES

A. *General Pass.* The monthly pass is essential to ensure affordable transportation for transit-dependent persons who utilize the bus for work and personal mobility throughout the day. MTA will provide general passes at the following prices:

1. monthly pass: $42.00

2. semi-monthly pass: $21.00

3. weekly pass: $11.00

MTA shall effectively market and distribute passes and tokens.

B. *Base Fare.* The general base fare shall be $1.35. Transfers shall be 25 cents.

C. *Off-Peak Discounts.* The fare shall be 75 cents during off-peak periods on selected lines that are heavily used by transit-dependents, as determined by MTA.

D. *Tokens.* The 90 cent token will be continued.

E. *Other Fares.* The prices for MTA's other passes, such as passes for seniors, disabled and students, shall be maintained at current levels for the duration of the general pass price, as set out in Section III.F (introductory paragraph), below.

F. *Duration.* The above fare structure will be effective December 1, 1996, and will remain in effect through November 1, 1998. Except as set forth in 1 and 2 below, from November 1, 1998 through November 1, 2003, MTA may increase fares up to a level reflecting any increase in

the Long Beach/Los Angeles Standard Metropolitan Statistical Area Consumer Price Index ("the CPI") from October 1, 1995 to the time the fare increase is proposed, with special reference to any increase or decrease in the household income of the bottom quartile of the Los Angeles County population (as published by the United States Department of Commerce) for the same period, or at a lesser rate if MTA chooses. In adjusting pass prices, the Board may round off the price to the nearest dollar. In adjusting fares other than passes and transfers, the Board may round off the price to the nearest nickel. This Consent Decree will not restrict MTA's authority to adjust fares after November 1, 2003. These provisions are subject to the following two conditions:

1. The prices of the general monthly, semi-monthly and weekly passes (the "general pass") shall not be increased until after November 1, 1999 unless MTA develops and adopts a new pass (or alternative system based on new technology) that ensures that pass prices for transit-dependent, low income riders will not be increased before November 1, 1999. If at any time MTA adopts a pass exclusively for transit-dependent, low income riders (a "low income pass") that is administratively feasible, then MTA may increase the price of the general pass without restrictions. A low income pass may require some type of income-related qualification or may be linked to appropriate government programs that assist low income people. MTA will consult with the JWG before it implements a low income pass. After November 1, 1999, the price of the new low income pass may be increased up to a level reflecting any increase in the CPI from October 1, 1995 to the time the low income pass

price increase is proposed, with special reference to any increase or decrease in the household income of the bottom quartile of the Los Angeles County population (as published by the United States Department of Commerce) for the same period, or at a lesser rate if MTA chooses. In adjusting low income and general pass prices, the Board may round off the price to the nearest dollar. All restrictions on low income pass increases shall terminate on November 1, 2003. MTA may exclude corporate buyers from eligibility for any and all passes at any time.

2. At any time, MTA, after consultation with the JWG, may propose an adjustment in fare levels and categories that reflects new technology and is consistent with the principles and objectives of this Consent Decree. If the JWG does not agree to the adjustments in fare ~~level~~ [levels /s/ Bliss] and categories resulting from the new technology, the matter may be submitted to the Special Master.

IV. JOINT WORKING GROUP

A. The parties shall establish a small Joint Working Group (JWG) consisting of an equal number of representatives of MTA and the plaintiffs' class. Each party shall select its own representatives. The purpose of the JWG will be to foster cooperation in the implementation of this Consent Decree.

B. MTA shall work with the JWG in the development and implementation of bus service improvement plans and on fare adjustment issues.

C. MTA shall engage in rider surveys, and shall seek the participation and concurrence of the JWG in developing the methodology and procedures for such surveys.

V. SPECIAL MASTER

A. The parties have agreed upon Donald T. Bliss to serve as the Special Master, subject to the approval of the District Court, to facilitate the resolution of disputes arising under any provision of this Consent Decree. If Mr. Bliss does not or cannot serve as the Special Master now or in the future, the parties shall try to agree on the selection of a Special Master, subject to the approval of the District Court. To the extent that the parties cannot agree on a Special Master, or if the District Court rejects the parties' selection, the District Court will appoint the Special Master.

B. Any dispute arising under any provision of Sections I through IV of this Consent Decree in which the JWG has a role shall initially be addressed by the JWG. If the JWG cannot resolve the matter, or if the JWG does not have a role in the disputed function, this dispute shall be referred to the attorneys to the parties. If the attorneys cannot resolve the matter informally, the attorneys shall refer the matter to the Special Master for resolution, pursuant to procedures set forth by the Special Master. Any matter resolved by or referred to the Special Master may be reviewed by the District Court, along with the recommendations of the Special Master, if any, upon motion by either of the parties.

C. Subject to mutually agreeable conditions, the Special Master shall be compensated for his time and expense by MTA within 30 days of the submission of time charges and expenses to MTA Chief Executive Office or his or her delegee.

VI. MODIFICATION OF THE CONSENT DECREE

A. Any party to this Consent Decree may seek to modify any provision or provisions of this Consent Decree. The party seeking modification bears the burden of establishing, to the satisfaction of the Special Master and ultimately to the satisfaction of the Court, that a significant change in circumstances warrants revision of the Consent Decree, and that the proposed revision or revisions are suitably tailored to the changed circumstances.

B. Modification of this Consent Decree may be warranted when changed factual conditions make compliance with the Consent Decree unworkable or substantially more onerous, and when the changed factual conditions were unforeseen at the time of the entry into this Consent Decree.

VII. INTERPRETATION OF THE CONSENT DECREE

If any dispute arises as to the interpretation of any provision of this Consent Decree, *no* prior written drafts of this Consent Decree shall be used in any way to interpret any provision of this Consent Decree.

VIII. CONTINUING JURISDICTION

The District Court shall retain jurisdiction over this litigation for ten years from the date of the approval of this Consent Decree in order to monitor compliance with this Consent Decree. At the end of seven years MTA may file a motion with the District Court to terminate the Consent Decree and the Court shall grant such motion if MTA shows to the Court's satisfaction that it has substantially complied with the Consent Decree and that it has in place a service plan that will enable continued adherence to the principles and objectives of the Consent Decree during the five years subsequent to the termination of this Consent Decree.

IX. ATTORNEYS' FEES, COSTS AND EXPENSES

A. Plaintiffs intend to apply for reasonable attorneys' fees, costs and expenses in connection with the litigation that resulted in this Consent Decree.

B. Plaintiffs shall be entitled to reasonable attorneys' fees, costs and expenses for monitoring compliance with the Consent Decree, subject to mutually agreeable conditions.

C. The parties will endeavor to resolve the foregoing matters informally, and, if they are not able to do so, the matter will be submitted to the Special Master, who shall make recommendations to the parties. If either party or both parties do not accept those recommendations, the matter will be submitted, along with the recommendations of the Special Master, to the District Court through a

motion filed within 45 days of the date of the Special Master's recommendations.

ATTACHMENT A

THE NEED FOR ADDITIONAL MTA BUS SERVICE

This Attachment describes MTA bus service improvements for the transit-dependent of Los Angeles County, as required by Section II of the Consent Decree. MTA shall have flexibility to use alternative service delivery options in fulfilling its obligations pursuant to this Consent Decree.

I. OVERALL PRINCIPLES

A. Additional bus service in Los Angeles County would achieve the following goals:

- To reduce overcrowding
- To reduce waiting and transfer times
- To meet unmet employment, medical, educational and other needs
- To serve new areas
- To allow greater mobility to other parts of the County for the transit-dependent
- To meet unmet ridership needs
- To replace old buses and bring the fleet up to modern standards

B. MTA shall reallocate and expand its bus fleet to meet the most basic needs of the transit-dependent. The

additional service will address the following categories of need:

- Reduction of overcrowded lines
- Essential non-emergency medical transportation
- Access to County-wide job and education centers

II. REDUCTION OF OVERCROWDED LINES THROUGH TARGET LOAD FACTORS

These target load factors are set out in Section II.A of the Consent Decree above and shall be achieved in the manner set forth therein.

III. EXPANDED BUS SERVICE IMPROVEMENT PROGRAM

The manner in which MTA shall implement the expanded bus service improvement program is set forth in Section II.B of the Consent Decree above.

IV. NEW BUS SERVICES

A. *Essential Non-Emergency Medical Transportation Needs.* With the restructuring of the County Health Care system, patients often have to travel long distances to clinics in other communities. It is essential that transit-dependent people be able to get to these clinics in a reasonable amount of time. In the design of the pilot project set forth in Section II.C.2 of the Consent Decree, MTA shall consider the feasibility of (1) adding buses for lines 120-121, 117 and 264 to bring more reliable service to the Los Amigos Medical Center, and (2) adding buses

on line 205 and extending a branch of line 204 to the Harbor/UCLA Hospital. MTA shall undertake a more detailed analysis, along with the JWG, to assess the transit needs at other public hospitals in connection with the five-year plan described in Section II.C.2.

B. *New Bus Service To Job and Education Centers.* In designing the pilot project and developing the five-year plan in consultation with the JWG, as set forth in Section II.C.2 of the Consent Decree, MTA shall develop a plan to provide additional service, or to add service to existing routes, via bus and other vehicles to meet the needs of the transit-dependent attempting to travel to and from job and education centers. This plan shall enable transit-dependent riders to move from their neighborhoods to areas of employment and health care. The plan shall expand bus and other vehicle service to serve important centers outside downtown Los Angeles. If the JWG cannot agree on a five-year plan, the issue may be referred to the Special Master.

ATTACHMENT B

This attachment sets forth action steps to enhance security, improve bus stops, increase user-friendliness, and improve bus service efficiency for transit-dependent riders, as required by Section II.D of the Consent Decree, above.

I. BUS SECURITY

A. *48 Additional Officers. MTA shall take specific steps to improve security for bus riders.* In this regard, in 1995 MTA received a matching grant from the Department of Justice ("DOJ") which has provided approximately $2 million to improve bus security and ultimately could lead to additional grants totalling another $2 million. Specifically, last year the DOJ grant provided $1.1 million to MTA that was used to hire 12 transit officers exclusively assigned to buses in South Central Los Angeles. The grant was a three-year grant and MTA agrees to continue to fund those additional 12 officers after the grant expires.

MTA received an additional DOJ matching grant of $900,000 in fiscal year 1996 to fund the hiring of 12 transit officers to be assigned exclusively to bus operations in East [Los /s/ Bliss] Angeles. MTA agrees to hire these 12 officers and assign them to bus operations in East Los Angeles and to continue the funding of these additional 12 officers after the DOJ grant expires.

MTA has applied for a third matching grant from the DOJ that would provide 12 additional officers dedicated exclusively to bus operations in the Hollywood-Rampart-Koreatown area, which is another high crime, highly transit-dependent area of the city. Next year MTA shall apply for a fourth matching grant from the DOJ that would result in 12 officers being added to the police bus operations in another highly transit-dependent area, the east San Fernando Valley. If these two additional grants are approved, then another 24 officers shall be added within the next two years.

As set forth above, MTA shall authorize ~~the~~ [/s/ Bliss] MTA matching funds to provide a net increase over 4 years of 48 transit officers (which includes continued funding of the 12 officers already working in South Central Los Angeles) and, if the grants are approved, MTA will assign such officers exclusively to bus operations in transit-dependent areas.

B. *Women In Transit Grant.* MTA shall apply for a special $400,000 grant from the U.S. Department of Transportation under the Omnibus Crime Bill of 1994. This grant shall fund a special unit to concentrate on safety and security for women who use the MTA regional public transit system, with special emphasis on heavily transit-dependent areas.

II. BUS STOPS

Bus-stop improvement involves the cooperation and approval of the different jurisdictions which own the bus stops.

A. *Pilot Program for Bus Shelter Improvement.* MTA shall make available as part of its Call For Projects a total of $500,000 over the next five years to be dedicated to bus-stop improvement. While the local jurisdictions will apply for such funds, MTA agrees that any funds provided through such grants shall go first to communities that are heavily transit-dependent. The JWG will evaluate this pilot project and recommend to the MTA Board an expanded program for bus stop improvements.

B. *Los Angeles Neighborhood Initiative Program (LANI).* MTA has received a grant from the Department of

Transportation for $3.9 million to fund the Los Angeles Neighborhood Initiative Program ("LANI"). LANI is focused on eight neighborhoods, each of which has been identified as transit-dependent and economically challenged. The program organizes local councils to suggest local transit improvements. To date, the local councils have asked for and MTA has provided at least 21 new bus shelters, the planting of street trees near bus stops in these neighborhoods, and additional landscaping to improve the pedestrian environment at bus stops.

Phase 2 of LANI, which is just beginning, shall include the purchase and installation of security cameras and additional lighting at bus stops, as well as the placement of route information machines at transit information booths in the chosen neighborhoods.

Additionally, the LANI councils applied for and received $320,000 from MTA to be used for additional improvements to bus stops and for the establishment of transit information booths. MTA will work with the JWG to evaluate whether the LANI concept should be continued and expanded.

III. USER FRIENDLINESS

A. *Smart Shuttle.* In last year's Call For Projects, MTA awarded a total of approximately $8 million for a two-year demonstration project to test the viability of Smart Shuttles. Four demonstration projects, three of which are in areas containing large minority populations, were designated: (1) Westlake-MacArthur; (2) South Central Los Angeles; (3) Northeast Valley; and (4) West San Fernando Valley.

With respect to the Smart Shuttle service in the Northeast Valley, service is expected to begin in 1997 and continue for approximately two years. Such service is expected to include putting in a circulator service, which will aid transit-dependent riders who must travel long distances to reach transit stops. This circulator will utilize vans as well as smaller sized buses operating in a more flexible manner than would be available with fixed-route bus service. It is expected to allow riders to call in beforehand so that they can most efficiently be picked up and taken to their destinations. In South Central Los Angeles and MacArthur Park, where the transit systems are overcrowded, the Smart Shuttle will provide connections to regional transportation systems such as the Blue Line, Green Line, Red Line and Harbor Transitway. Smart Shuttle is expected to permit individual passengers and vehicle operators to become acquainted with each other in a way not normally possible with fixed-route bus service. MTA shall work with the JWG to find ways to utilize Smart Shuttles to improve personal mobility in transit-dependent areas. Smart Shuttle programs shall not adversely affect bus improvements for the transit-dependent and shall seek to provide greater service to the transit-dependent.

B. *Bus Restructuring Study.* In 1993 MTA initiated the Bus Restructuring Study in an effort to make the entire bus system more user friendly. The study divides the bus system into eight areas and analyzes each area to determine the nature of the problems experienced by riders and what can be done to eliminate or reduce those problems. In this regard, recently an evaluation began of the mid-cities area, which includes South Central Los

Angeles, to determine how bus service can be improved. The study will cost approximately $450,000, will seek community input, will examine innovative transit services, will improve coordination between MTA and municipal operators, and should result in substantial improvement in the nature of bus service in the inner city. MTA will consult with the JWG on the findings of the Bus Restructuring Study.

C. *Service Planning/Market Research Study.* MTA is currently commissioning a very extensive customer satisfaction market research study. This study involves extensive surveys of current bus riders, former bus riders and non-users to determine their attitudes ~~toward~~ [towards /s/ Bliss] the bus system. The goal is to get an accurate portrait of who is riding the buses and what can be done to make the buses more attractive to bus riders. MTA will consult with the JWG on the design and the findings of the study.

D. *Fare Debit Cards and Smart Cards.* MTA is in the process of analyzing both a fare debit card and a "smart" card. In this regard, MTA recently funded a demonstration project in which three municipal bus operators utilized the fare debit card. This type of fare mechanism will facilitate the integration and coordination of all of the transit operators in Los Angeles County, which will permit riders to move easily from one system to another. This demonstration study and implementation cost $5.8 million. MTA will consult with the JWG in evaluating the demonstration project and the feasibility of using a fare debit card or smart card system-wide.

E. *Immediate Needs Transportation Program.* Pursuant to this program, each year MTA provides $5 million in subsidies to pay for taxi vouchers and bus tokens to social service and health care organizations for the transportation of their most needy clients. The program currently provides such vouchers and tokens to over 400 agencies in Los Angeles County. MTA shall use its best efforts to continue this program.

F. *Signal Priority For Buses and Exclusive Bus Lanes.* MTA shall implement signal priority and bus preference projects that would involve synchronizing traffic lights to favor buses and designating traffic lanes as being solely for buses in order to improve service for the transit-dependent. MTA has committed $5 million to the continued analysis of these options. MTA will use its best efforts to implement feasible options.

G. *Mobility Allowance.* MTA has and continues to make extensive plans involving mobility allowance. The essence of the mobility allowance is to provide vans, taxis and smaller buses to: (1) areas that MTA is responsible for serving but which do not need regularly scheduled fixed-route service, and (2) areas that do not need fixed-route service in hours of lower demand. MTA believes that millions of dollars could be saved and that transit service could be substantially improved by substituting vans and taxicabs for such fixed-route service and that any resulting savings could be used to provide additional buses in those areas where overcrowding is occurring. Mobility allowance programs shall not adversely affect bus improvements for the transit-dependent and shall seek to provide greater service to the transit-dependent. MTA

will consult with the JWG in identifying ways to provide more flexible transit services in transit-dependent areas.

SO ORDERED:

Dated: October 29, 1996

/s/ Terry J. Hatter, Jr.
Hon. Terry J. Hatter, Jr.
United States District Judge

Submitted by:

/s/ Robert Garcia
Robert Garcia
Attorney for Plaintiffs and the Class

/s/ Kenneth Klein
Kenneth Klein
Attorney for Defendants

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 300 South Grand Avenue, 29th Floor, Los Angeles, California 90071-3155.

On October 29, 1996, I served the within STIPULATION RE SUBMISSION OF CONSENT DECREE on interested parties in this action by placing a true copy thereof in a mail box maintained by the U.S. Postal Service,

enclosed in a sealed envelope with postage thereon fully prepaid at Los Angeles, California, addressed as follows:

NAACP Legal Defense and
Educational Fund, Inc.
Elaine R. Jones, Esq.
99 Hudson Street, 16th Floor
New York, New York 10013

ACLU Foundation of Southern California
E. Richard Larson, Esq.
1616 Beverly Boulevard
Los Angeles, California 90026

Paul Hoffman, Esq.
100 Wilshire Boulevard, Suite 1000
Santa Monica, California 90401

NAACP Legal Defense and
Educational Fund, Inc.
Robert Garcia, Esq.
315 West Ninth Street, Suite 208
Los Angeles, California 90015

I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on October 29, 1996, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Louise A. Monroe
Louise A. Monroe

APPENDIX G

California Codes Annotated

§ 130001. Legislative findings and declarations

The Legislature hereby finds and declares that:

(a) Public demand for an efficient public transportation system in the southern California region resulting from population sprawl, the concentration of many transit dependent citizens in the large urban areas, and increasing mobility requirements indicates a need for improved, as well as more innovative, policy and decisionmaking institutions to resolve these problems.

(b) A basic purpose of transportation policy within the region should be to avoid undesirable duplication of transportation services, achieve the operation of a coordinated and integrated transportation system which will reduce automobile usage and dependency, reduce the consumption of scarce and expensive energy fuels, and reduce the levels of automobile-related air pollution.

(c) Recognizing the scarcity of resources available for all transportation development, the commissions shall give priority to low-cost highway and transit improvements, and shall work toward maximizing the effectiveness of existing resources available to the commissions.

(d) Recognizing the importance of the state highway system in the Los Angeles metropolitan area to bus, automobile, and freight transportation, it is necessary to maintain this highway system at least at its present operating standards and to increase the person-moving capability of this system by such methods as carpooling,

improved traffic operations, exclusive busways, and fringe parking facilities.

(e) The transportation system should offer adequate public transportation to all citizens, including those immobilized by poverty, age, physical handicaps, or other reasons.

(f) The cities and local communities acting singly or jointly should be given more responsibilities for designing and providing local transit services to improve the responsiveness of public transit to public needs.

(g) The transportation decisionmaking process should be responsive to public values, and provide for the continuing involvement of the public in the preparation, revision, and discussion of transportation plans and services.

(h) Transportation planning should recognize that transportation systems have significant effect on the physical and socioeconomic characteristics of the areas served, and emphasis should be given to the protection and enhancement of the environment and the restoration of blighted neighborhoods near community centers. Los Angeles County, in particular, is a multicentered area with diverse socioeconomic levels and travel patterns, and a majority of the trips in the county are four miles or less.

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§ 130106. Annual budget; adoption; requisites

Notice of time and place of the public hearing for the adoption of the annual budget shall be published pursuant to Section 6061 of the Government Code, and shall be published not later than the 15th day prior to the date of the hearing.

The proposed annual budget shall be available for public inspection at least 15 days prior to the hearing.

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§ 130301. Multicounty designated transportation planning agency; functions

The multicounty designated transportation planning agency which includes the area of the commission shall be responsible for long-range transportation system planning, including preparation of the regional transportation plan as defined in Chapter 2.5 (commencing with Section 65080) of Title 7 of the Government Code in such area.

Such planning shall be directed to, among other things:

(a) Identification of corridors of travel.

(b) Definition of the transportation problems of each corridor.

(c) Definition of the transportation goals for each corridor.

(d) Definition of land use goals, with the concurrence of affected local jurisdictions, that should be supported by transportation investment decisions in each corridor.

(e) Recommendation of priority corridors for major resource allocations.

(f) Recommendation of the mix of alternative transportation modes appropriate for deployment in light of the transportation needs and goals for each corridor.

(g) Recommendation of environmental, economic, energy, and social policies that should guide transportation investment decision within corridors.

(h) Coordination of the plans and short-range transportation improvement programs developed by the commissions, including resolution of conflicts between such plans and programs.

(i) Determination of regional priorities and an annual regional program for the use of federal-aid urban system funds, and funds to be expended pursuant to Section 1604 of Title 49 of the United States Code, based on the priorities of projects appearing in the short-range transportation improvement program adopted by each commission.

(j) Review and comment concerning all near-term transportation improvement programs after the development of, but prior to, adoption of such programs by the commission. The review shall be conducted pursuant to Section 130059 and in such a manner so that it does not unnecessarily slow or impede the transportation planning and programming process.

(k) Development of an annual unified work program for all transportation planning activities within the jurisdiction of the multicounty designated transportation planning agency in cooperation and coordination with the Department of Transportation and the commission and in conformance with federal laws and rules and regulations. Such cooperation and coordination shall specifically apply to the determination of appropriate planning methods for projecting and planning transportation use, and its effect on land use, within the jurisdiction of the agency.

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49 U.S.C. § 5303. Metropolitan planning

(a) Development requirements. – To carry out section 5301(a) of this title, metropolitan planning organizations designated under subsection (c) of this section, in cooperation with the States shall develop transportation plans and programs for State urbanized areas. The plans and programs for each area shall provide for developing transportation facilities (including pedestrian walkways and bicycle transportation facilities) that will function as an intermodal transportation system for the State, metropolitan area, and United States. The development process shall provide for consideration of all modes of transportation and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems.

(b) Plan and program factors. – In developing plans and programs under this section and sections 5304-5306

of this title, each metropolitan planning organization at least shall consider the following factors:

(1) preserving existing transportation facilities and, where practical, ways to meet transportation needs by using existing transportation facilities more efficiently.

(2) the consistency of transportation planning with United States Government, State, and local energy conversation programs, goals, and objectives.

(3) the need to relieve congestion and prevent congestion from occurring.

(4) the likely effect of transportation policy decisions on land use and development and the consistency of transportation plans and programs with short- and long-term land use and development plans.

(5) programming expenditures on transportation enhancement activities, as required under section 133 of title 23.

(6) the effects of all transportation projects to be undertaken in the metropolitan area, without regard to whether the projects are publicly financed.

(7) international border crossings and access to ports, airports, intermodal transportation facilities, major freight distribution routes, national parks, recreation areas, monuments and historic sites, and military installations.

(8) the need for connecting roads in the metropolitan area with roads outside the area.

(9) the transportation needs identified by using the management systems required by section 303 of title 23.

(10) preserving rights of way for constructing future transportation projects, including identifying –

(A) unused rights of way that may be needed for future transportation corridors; and

(B) corridors where action is needed most to prevent destruction or loss.

(11) ways to enhance the efficient movement of freight.

(12) using life-cycle costs in designing and engineering bridges, tunnels, and pavement.

(13) the overall social, economic, energy, and environmental effects of transportation decisions.

(14) ways to expand and enhance mass transportation services and to increase usage of those services.

(15) capital investments that will result in increased security in mass transportation systems.

(c) **Designating metropolitan planning organizations.** – (1) To carry out the planning process required by this section, a metropolitan planning organization shall be designated for each urbanized area with a population of more than 50,000 –

(A) by agreement of the chief executive officer of a State and units of general local government representing at least 75 percent of the affected population (including the central city as defined by the Secretary of Commerce); or

(B) under procedures established by State or local law.

(2) In a metropolitan area designated as a transportation management area, the designated metropolitan

planning organization, if redesignated after December 18, 1991, shall include local elected officials, officials of authorities that administer or operate major modes of transportation in the metropolitan area (including all transportation authorities included in the organization on June 1, 1991), and appropriate State officials.

(3) More than one metropolitan planning organization may be designated in an urbanized area (as defined by the Secretary of Commerce) only if the chief executive officer decides that the size and complexity of the urbanized area make designation of more than one organization appropriate.

(4) A designation is effective until –

(A) the organization is redesignated under paragraph (3) of this subsection; or

(B) revoked –

(i) by agreement of the chief executive officer and units of general local government representing at least 75 percent of the affected population; or

(ii) as otherwise provided by State or local procedures.

(5)(A) The chief executive officer and units of general local government representing at least 75 percent of the affected population (including the central city as defined by the Secretary of Commerce) may redesignate by agreement a metropolitan planning organization when appropriate to carry out this section.

(B) A metropolitan planning organization shall be redesignated on request of one or more units of general

local government representing at least 25 percent of the affected population (including the central city as defined by the Secretary of Commerce) in an urbanized area with a population of more than 5,000,000, but less than 10,000,000 or that is an extreme nonattainment area for ozone or carbon monoxide (as defined in the Clean Air Act (42 U.S.C. 7401 et seq.)).

(C) A metropolitan planning organization shall be redesignated using procedures established to carry out this paragraph.

(6) This subsection does not affect the authority, under State law in effect on December 18, 1991, of a public authority with multimodal transportation responsibilities –

(A) to develop plans and programs for a metropolitan planning organization to adopt; and

(B) to develop long-range capital plans, coordinate mass transportation services and projects, and carry out other activities under State law.

(d) **Metropolitan area boundaries.** – To carry out this section, the metropolitan planning organization and the chief executive officer shall decide by agreement on the boundaries of a metropolitan area. The area shall cover at least the existing urbanized area and the contiguous area expected to become urbanized within the 20-year forecast period and may include the Metropolitan Statistical Area or Consolidated Metropolitan Statistical Area, as defined by the Secretary of Commerce. An area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.) shall include at least the boundaries of the nonattainment

area, except as the chief executive officer and metropolitan planning organization otherwise agree.

(e) Coordination. – (1) The Secretary of Transportation shall establish requirements the Secretary considers appropriate to encourage chief executive officers and metropolitan planning organizations with responsibility for part of a multi-State metropolitan area to provide coordinated transportation planning for the entire area.

(2) Congress consents to at least 2 States making an agreement, not in conflict with a law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section related to interstate areas and localities in the States and establishing authorities the States consider desirable for making the agreement effective.

(3) If more than one metropolitan planning organization has authority in a metropolitan area or an area designated a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.), each organization shall consult with the other organizations designated for the area and the State to coordinate plans and projects required by this section and sections 5304-5306 of this title.

(f) Developing long-range plans. – (1) Each metropolitan planning organization shall prepare and update periodically, according to a schedule the Secretary of Transportation decides is appropriate, a long-range plan for its metropolitan area under the requirements of this section. The plan shall be in the form the Secretary considers appropriate and at least shall –

(A) identify transportation facilities (including major roadways, mass transportation, and multimodal and intermodal facilities) that should function as an integrated metropolitan transportation system, emphasizing transportation facilities that serve important United States and regional transportation functions;

(B) include a financial plan that –

(i) demonstrates how long the long-range plan can be carried out;

(ii) indicates resources from public and private sources reasonably expected to be made available to carry out the plan; and

(iii) recommends innovative financing techniques, including value capture, tolls, and congestion pricing, to finance needed projects and programs;

(C) assess capital investment and other measures necessary –

(i) to ensure the preservation of the existing metropolitan transportation system, including requirements for operational improvements, resurfacing, restoration, and rehabilitation of existing and future major roadways, and operations, maintenance, modernization, and rehabilitation of existing and future mass transportation facilities; and

(ii) to use existing transportation facilities most efficiently to relieve vehicular congestion and maximize the mobility of individuals and goods; and

(D) indicate appropriate proposed transportation enhancement activities.

(2) When formulating a long-range plan, the metropolitan planning organization shall consider the factors described in subsection (e) of this section as they are related to a 20-year forecast period.

(3) In a metropolitan area that is in a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.), the metropolitan planning organization shall coordinate the development of the long-range plan with the development of the transportation control measures of the State Implementation Plan required by the Act.

(4) Before approving a long-range plan, each metropolitan planning organization shall provide citizens, affected public agencies, representatives of mass transportation authority employees, private providers of transportation, and other interested parties with a reasonable opportunity to comment on the plan in a way the Secretary of Transportation considers appropri[illegible].

(5) A long-range plan shall be –

(A) made readily available for public review; and

(B) submitted for information purposes to the chief executive officer of the State at the time and in the way the Secretary of Transportation establishes.

(g) **Grants.** – Under criteria the Secretary of Transportation establishes, the Secretary may make contracts for, and grants to, States, local governmental authorities, and authorities of the States and governmental authorities, or may make agreements with other departments, agencies, and instrumentalities of the Government, to

plan, engineer, design, and evaluate a mass transportation project and for other technical studies, including –

(1) studies related to management, operations, capital requirements, and economic feasibility;

(2) evaluating previously financed projects; and

(3) other similar and related activities preliminary to and in preparation for constructing, acquiring, or improving the operation of facilities and equipment.

(h) Balanced and comprehensive planning. – (1) To the extent practicable, the Secretary of Transportation shall ensure that amounts made available under section 5338(g)(1) of this title to carry out this section and sections 5304-5306 of this title are used to support balanced and comprehensive transportation planning that considers the relationships among land use and all transportation modes, without regard to the programmatic source of the planning amounts.

(2)(A) The Secretary of Transportation shall apportion 80 percent of the amount made available under section 5338(g)(1) of this title to States in a ration equal to the population in urbanized areas in each State divided by the total population in urbanized areas in all States, as shown by the latest available decennial census. A State may not receive less than .5 percent of the amount apportioned under this subparagraph.

(B) Amounts apportioned to a State under subparagraph (A) of this paragraph shall be allocated to metropolitan planning organizations in the State designated under this section under a formula –

(i) the State develops in cooperation with the metropolitan planning organizations;

(ii) the Secretary of Transportation approves; and

(iii) that considers population in urbanized areas and provides an appropriate distribution for urbanized areas to carry out the cooperative processes described in this section.

(C) A State shall make amounts available promptly to eligible metropolitan planning organizations according to procedures the Secretary of Transportation approves.

(3)(A) The Secretary of Transportation shall apportion 20 percent of the amount made available under section 5338(g)(1) of this title to States to supplement allocations made under paragraph (2)(B) of this subsection for metropolitan planning organizations.

(B) Amounts under this paragraph shall be allocated under a formula that reflects the additional cost of carrying out planning, programming, and project selection responsibilities under this section and sections 5304-5306 of this title in those areas.

(4) To the maximum extent practicable, the Secretary of Transportation shall ensure that no metropolitan planning organization is allocated less than the amount it received by administrative formula under this section in the fiscal year that ended September 30, 1991. To carry out this subsection, the Secretary may make a proportionate reduction in other amounts made available to carry out section 5338(g)(1) of this title.

(5) Amounts available for an activity under this subsection are for 80 percent of the cost of the activity

unless the Secretary of Transportation decides it is in the interests of the Government not to require a State or local match.

(6) An amount apportioned under this subsection –

(A) remains available for 3 years after the fiscal year in which the amount is apportioned, and

(B) that is unobligated at the end of the 3-year period shall be reapportioned among the States for the next fiscal year.

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49 U.S.C. § 5304. Transportation improvement program

(a) Development and update. – In cooperation with the State and affected mass transportation operators, a metropolitan planning organization designated for a metropolitan area shall develop a transportation improvement program for the area. In developing the program, the organization shall provide citizens, affected public agencies, representatives of transportation authority employees, other affected employee representatives, private providers of transportation, and other interested parties with a reasonable opportunity to comment on the proposed program. The program shall be updated at least once every 2 years and shall be approved by the organization and the chief executive officer of the State.

(b) Contents. – A transportation improvement program for a metropolitan area shall include –

(1) a priority list of projects and parts of projects to be carried out in each 3-year period after the program is adopted; and

(2) a financial plan that –

(A) demonstrates how the program can be carried out;

(B) indicates resources from public and private sources that reasonably are expected to be made available to carry out the plan; and

(C) recommends innovative financing techniques, including value capture, tolls, and congestion pricing, to finance needed projects.

(c) **Project selection.** – (1) Except as provided in section 5305(d)(1) of this title, the State, in cooperation with the metropolitan planning organization, shall select projects in a metropolitan area that involve United States Government participation. Selection shall comply with the transportation improvement program for the area.

(2) A transportation improvement program for a metropolitan area shall include –

(A) projects within the area that are proposed for financing under this chapter and title 23 and that are consistent with the long-range plan developed under section 5303(f) of this title; and

(B) a project or an identified phase of a project only if full financing reasonably can be anticipated to be available for the project in the period estimated for completion.

(d) **Notice and comment.** – Before approving a transportation improvement program, a metropolitan planning organization shall provide citizens, affected public agencies, representatives of transportation agency employees, private providers of transportation, and other

interested parties with reasonable notice and an opportunity to comment on the proposed program.

(e) Regulatory proceeding. – Not later than June 18, 1992, the Secretary of Transportation shall begin a regulatory proceeding to conform review requirements for mass transportation projects under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) to comparable requirements under that Act applicable to highway projects. This section and sections 5303, 5305, and 5306 of this title to not affect the applicability of the Act to mass transportation or highway projects. A mass transportation project that has an approved draft Environmental Impact Statement is exempt from complying with requirements under the Act applicable to highway projects.

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49 U.S.C. § 5305. Transportation management areas

(a) Designation. – The Secretary of Transportation shall designate as a transportation management area –

(1) each urbanized area with a population of more than 200,000; and

(2) any other area, including the Lake Tahoe Basin as defined in the Act of December 19, 1980 (Public Law 96-551, 94 Stat. 3233), when requested by the chief executive officer and the metropolitan organization designated for the area or the affected local officials.

(b) Transportation plans and programs. – Transportation plans and programs in a transportation management area shall be based on a continuing and

comprehensive transportation planning process the metropolitan planning organization carries out in cooperation with the State and mass transportation operators.

(c) Congestion management system. – The transportation planning process under sections 5303, 5304, and 5306 of this title in a transportation management area shall include a congestion management system providing for effective management, through travel demand reduction and operational management strategies, of new and existing transportation facilities eligible for financing under this chapter and title 23. The Secretary shall establish a phase-in schedule to comply with sections 5303, 5304, and 5306.

(d) Project selection. – **(1)(A)** In consultation with the State, the metropolitan planning organization designated for a transportation management area shall select the projects to be carried out in the area with United States Government participation under this chapter or title 23, except projects of the National Highway System or under the Bridge and Interstate Maintenance programs.

(B) In cooperation with the metropolitan planning organization designated for a transportation management area, the State shall select the projects to be carried out in the area of the National Highway System or under the Bridge and Interstate Maintenance programs.

(2)(A) A selection under this subsection must comply with the transportation improvement program for the area.

(B) A selection under paragraph (1)(A) of this subsection must comply with priorities established in the program.

(e) Certification. – (1) At least once every 3 years, the Secretary shall ensure and certify that each metropolitan planning organization in each transportation management area is carrying out its responsibilities under applicable laws of the United States. The Secretary may make the certification only if the organization is complying with section 134 of title 23 and other applicable requirements of laws of the United States and the organization and chief executive officer have approved a transportation improvement program for the area.

(2) If the Secretary does not certify before October 1, 1993, that a metropolitan planning organization is carrying out its responsibilities, the Secretary may withhold any part of the apportionment under section 104(b)(3) of title 23 attributed to the relevant metropolitan area under section 133(d)(3) of title 23 and capital amounts apportioned under section 5336 of this title. If an organization remains uncertified for more than 2 consecutive years after September 30, 1994, 20 percent of that apportionment and capital amounts shall be withheld. The withheld apportionments shall be restored when the Secretary certifies the organization.

(3) The Secretary may not withhold certification based on the policies and criteria a metropolitan planning organization or mass transportation grant recipient establishes under section 5306(a) of this title for deciding the feasibility of private enterprise participation.

(f) Additional requirements for certain nonattainment areas. – Government amounts may be made available for a mass transportation project resulting in a significant increase in carrying capacity for single occupant vehicles in a transportation management area classified as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.) only if the project is part of an approved congestion management system.

(g) Areas not designated transportation management areas. – (1) The Secretary may provide for the development of abbreviated metropolitan transportation plans and programs the Secretary decides are appropriate to carry out this section and sections 5303, 5304, and 5306 of this title for metropolitan areas not designated transportation management areas under this section. The Secretary shall consider the complexity of transportation problems in those areas, including transportation-related air quality problems.

(2) The Secretary may not prove an abbreviated plan or program for a metropolitan area on a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.).

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49 U.S.C. § 5307. Block grants

(a) Definitions. – In this section –

(1) "associated capital maintenance items" means equipment, tires, tubes, and material, each costing at least

.5 percent of the current fair market value of rolling stock comparable to the rolling stock for which the equipment, tires, tubes, and material are to be used.

(2) "designated recipient" means –

(A) a person designated, consistent with the planning process under sections 5303-5306 of this title, by the chief executive officer of a State, responsible local officials, and publicly owned operators of mass transportation to receive and apportion amounts under section 5336 of this title that are attributable to transportation management areas established under section 5305(a) of this title;

(B) a State or regional authority if the authority is responsible under the laws of a State for a capital project and for financing and directly providing mass transportation; or

(C) a recipient designated under section 5(b)(1) of the Federal Transit Act not later than January 5, 1983.

(b) **General authority.** – (1) The Secretary of Transportation may make grants under this section for capital projects and to finance the planning, improvement, and operating costs of equipment, facilities, and associated capital maintenance items for use in mass transportation, including the renovation and improvement of historic transportation facilities with related private investment.

(2) In a transportation management area designated under section 5305(a) of this title, amounts that cannot be used to pay operating expenses under this section also are available for a highway project if –

(A) that use is approved by the metropolitan planning organization under section 5303 of this title after appropriate notice and an opportunity for comment and appeal is provided to affected mass transportation providers; and

(B) the Secretary decides the amounts are not needed for investment required by the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(3) A grant for a capital project under this section also is available to finance the leasing of equipment and facilities for use in mass transportation, subject to regulations the Secretary prescribes limiting the grant to leasing arrangements that are more cost effective than acquisition or construction.

(4) A project for the reconstruction of equipment and material, each of which after reconstruction will have a fair market value of at least .5 percent of the current fair market value of rolling stock comparable to the rolling stock for which the equipment and material will be used, is a capital project for an associated capital maintenance item under this section.

(5) Amounts under this section are available for a highway project under title 23 only if amounts used for the State or local share of the project are eligible to finance either a highway or mass transportation project.

(c) **Public participation requirements.** – Each recipient of a grant shall –

(1) make available to the public information on amounts available to the recipient under this section

and the program of projects the recipient proposes to undertake;

(2) develop, in consultation with interested parties, including private transportation providers, a proposed program of projects for activities to be financed;

(3) publish a proposed program of projects in a way that affected citizens, private transportation providers, and local elected officials have the opportunity to examine the proposed program and submit comments on the proposed program and the performance of the recipient;

(4) provide an opportunity for a public hearing in which to obtain the views of citizens on the proposed program of projects;

(5) ensure that the proposed program of projects provides for the coordination of mass transportation services assisted under section 5336 of this title with transportation services assisted from other United States Government sources;

(6) consider comments and views received, especially those of private transportation providers, in preparing the final program of projects; and

(7) make the final program of projects available to the public.

(d) **Grant recipient requirements.** – A recipient may receive a grant in a fiscal year only if –

(1) the recipient, within the time the Secretary prescribes, submits a final program of projects prepared under subsection (c) of this section and a certification for that fiscal year that the recipient (including a person receiving amounts from a chief executive officer of a State under this section) –

(A) has or will have the legal, financial, and technical capacity to carry out the program;

(B) has or will have satisfactory continuing control over the use of equipment and facilities;

(C) will maintain equipment and facilities;

(D) will ensure that elderly and handicapped individuals, or an individual presenting a medicare card issued to that individual under title II or XVIII of the Social Security Act (42 U.S.C. 401 et seq., 1395 et seq.), will be charged during non-peak hours for transportation using or involving a facility or equipment of a project financed under this section not more than 50 percent of the peak hour fare;

(E) in carrying out a procurement under this section –

(i) will use competitive procurement (as defined or approved by the Secretary);

(ii) will not use a procurement that uses exclusionary or discriminatory specifications; and

(iii) will comply with applicable Buy America laws in carrying out a procurement;

(F) has complied with subsection (c) of this section;

(G) has available and will provide the required amounts as provided by subsection (e) of this section;

(H) will comply with sections 5301(a) and (d), 5303-5306, and 5310(a)-(d) of this title;

(I) has a locally developed process to solicit and consider public comment before raising a

fare or carrying out a major reduction of transportation; and

(J)(i) will expend for each fiscal year for mass transportation security projects, including increased lighting in or adjacent to a mass transportation system (including bus stops, subway stations, parking lots, and garages), increased camera surveillance of an area in or adjacent to that system, providing an emergency telephone line to contact law enforcement or security personnel in an area in or adjacent to that system, and any other project intended to increase the security and safety of an existing or planned mass transportation system, at least one percent of the amount the recipient receives for each fiscal year under section 5336 of this title; or

(ii) has decided that the expenditure for security projects is not necessary; and

(2) the Secretary accepts the certification.

(e) Government's share of costs. – A grant of the Government for a capital project (including associated capital maintenance items) under this section is for 80 percent of the net project cost of the project. A recipient may provide additional local matching amounts. A grant for operating expenses may not be more than 50 percent of the net project cost of the project. The remainder of the net project costs shall be provided in cash from sources other than amounts of the Government or revenues from providing mass transportation (excluding revenues derived from the sale of advertising and concessions that are more than the amount of those revenues in the fiscal year that ended September 30, 1985). Transit system amounts that make up the remainder shall be from an

undistributed cash surplus, a replacement or depreciation cash fund or reserve, or new capital.

(f) Statewide operating assistance. – (1) A State authority that is a designated recipient and providing mass transportation in at least 2 urbanized areas may apply for operating assistance in an amount not more than the amount for all urbanized areas in which it provides transportation.

(2) When approving an application under paragraph (1) of this subsection, the Secretary may not reduce the amount of operating assistance approved for another State or a local transportation authority within the affected urbanized areas.

(g) Undertaking projects in advance. – (1) When a recipient obligates all amounts apportioned to it under section 5336 of this title and then carries out a part of a project described in this section (except a project for operating expenses) without amounts of the Government and according to all applicable procedures and requirements (except to the extent the procedures and requirements limit a State to carrying out a project with amounts of the Government previously apportioned to it), the Secretary may pay to the recipient the Government's share of the cost of carrying out that part when additional amounts are apportioned to the recipient under section 5336 if –

(A) the recipient applies for the payment;

(B) the Secretary approves the payment; and

(C) before carrying out that part, the Secretary approves the plans and specifications for the part in the same way as for other projects under this section.

(2) The Secretary may approve an application under paragraph (1) of this subsection only if an authorization for this section is in effect for the fiscal year to which the application applies. The Secretary may not approve an application if the payment will be more than –

(A) the recipient's expected apportionment under section 5336 of this title if the total amount authorized to be appropriated for the fiscal year to carry out this section is appropriated; less

(B) the maximum amount of the apportionment that may be made available for projects for operating expenses under this section.

(3) The cost of carrying out that part of a project includes the amount of interest earned and payable on bonds issued by the recipient to the extent proceeds of the bonds are expended in carrying out the part. However, the amount of interest allowed under this paragraph may not be more than the amount by which the estimated cost of carrying out the part (if it would be carried out at the time the part is converted to a regularly financed project) exceeds the actual cost (except interest) of carrying out the part.

(4) The Secretary shall consider changes in capital project cost indices when determining the estimated cost under paragraph (3) of this subsection.

(h) **Streamlined administrative procedures.** – The Secretary shall prescribe streamlined administrative procedures for complying with the certification requirement under subsection (d)(1)(B) and (C) of this section for track and signal equipment used in existing operations.

(i) Reviews, audits, and evaluations. – (1)(A) At least annually, the Secretary shall carry out, or require a recipient to have carried out independently, reviews and audits the Secretary considers appropriate to establish whether the recipient has carried out –

(i) the activities proposed under subsection (d) of this section in a timely and effective way and can continue to do so; and

(ii) those activities and its certifications and has used amounts of the Government in the way required by law.

(B) An audit of the use of amounts of the Government shall comply with the auditing procedures of the Comptroller General.

(2) At least once every 3 years, the Secretary shall review and evaluate completely the performance of a recipient in carrying out the recipient's program, specifically referring to compliance with statutory and administrative requirements and the extent to which actual program activities are consistent with the activities proposed under subsection (d) of this section and the planning process required under sections 5303-5306 of this title.

(3) The Secretary may take appropriate action consistent with a review, audit, and evaluation under this subsection, including making an appropriate adjustment in the amount of a grant or withdrawing the grant.

(j) Reports. – A recipient (including a person receiving amounts from a chief executive officer of a State under this section) shall submit annually to the Secretary

a report on the revenues the recipient derives from the sale of advertising and concessions.

(k) Submission of certifications. – A certification under subsection (d) of this section and any additional certification required by law to be submitted to the Secretary may be consolidated into a single document to be submitted annually as part of the grant application under this section. The Secretary shall publish annually a list of all certifications required under this chapter with the publication required under section 5336(e)(2) of this title.

(*l*) Procurement system approval. – A recipient may request the Secretary to approve its procurement system. The Secretary shall approve the system for use for procurements financed under section 5336 of this title if, after consulting with the Administrator for Federal Procurement Policy, the Secretary decides the system provides for competitive procurement. Approval of a system under this subsection does not relieve a recipient of the duty to certify under subsection (d)(1)(E) of this section.

(m) Operating ferries outside urbanized areas. – A vessel used in ferryboat operations financed under section 5336 of this title that is part of a State-operated ferry system may be operated occasionally outside the urbanized area in which service is provided to accommodate periodic maintenance if existing ferry service is not reduced significantly by operating outside the area.

(n) Relationship to other laws. – **(1)** Section 1001 of title 18 applies to a certificate or submission under this section. The Secretary may end a grant under this section and seek reimbursement, directly or by offsetting amounts available under section 5336 of this title, when a

false or fraudulent statement or related act within the meaning of section 1001 is made in connection with a certification or submission.

(2) Sections 5302, 5318, 5323(a)(1), (d), and (f), 5332, and 5333 of this title apply to this section and to a grant made under this section. Except as provided in this section, no other provision of this chapter applies to this section or to a grant made under this section.

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49 U.S.C. § 5308. Mass Transit Account block grants

(a) General authority. – The Secretary of Transportation may make grants under this section to be used only for capital projects (including capital maintenance items).

(b) Application of other sections. – (1) Sections 5307(a)-(d), (h)-(*l*), and (n) and 5336(a)-(c), (f), (g), and (j) of this title apply to amounts made available under section 5338(a) of this title to carry out this section.

(2) Sections 5307(e) and 5336(d) of this title apply to grants under this section.

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49 U.S.C. § 5309. Discretionary grants and loans

(a) General authority. – The Secretary of Transportation may make grants and loans under this section to assist State and local governmental authorities in financing –

(1) capital projects for new fixed guideway systems, and extensions to existing fixed guideway systems, including the acquisition of real property, the initial acquisition of rolling stock for the systems, alternatives analysis related to the development of the systems, and the acquisition of rights of way, and relocation, for fixed guideway corridor development for projects in the advanced stages of alternatives analysis or preliminary engineering;

(2) capital projects, including property and improvements (except public highways other than fixed guideway facilities), needed for an efficient and coordinated mass transportation system;

(3) the capital costs of coordinating mass transportation with other transportation;

(4) the introduction of new technology, through innovative and improved products, into mass transportation;

(5) transportation projects that enhance urban economic development or incorporate private investment, including commercial and residential development, because the projects –

(A) enhance the effectiveness of a mass transportation project and are related physically or functionally to that mass transportation project; or

(B) establish new or enhanced coordination between mass transportation and other transportation;

(6) mass transportation projects planned, designed, and carried out to meet the special needs of elderly individuals and individuals with disabilities; and

(7) the development of corridors to support fixed guideway systems, including protecting rights of way through acquisition, construction of dedicated bus and high occupancy vehicle lanes and park and ride lots, and other nonvehicular capital improvements that the Secretary may decide would result in increased mass transportation usage in the corridor.

(b) Loans for real property interests. – (1) The Secretary of Transportation may make loans under this section to State and local governmental authorities to acquire interests in real property for use on urban mass transportation systems as rights of way, station sites, and related purposes, including reconstruction, renovation, the net cost of property management, and relocation payments made under section 5324(a) of this title.

(2) The Secretary of Transportation may make a loan under paragraph (1) of this subsection for an approved project only after finding that the property reasonably is expected to be required for a mass transportation system and that it will be used for that system within a reasonable time.

(3) An applicant for a loan under this subsection shall provide a copy of the application to the planning agency for the community affected by the project at the same time the application is submitted to the Secretary of Transportation. If the planning agency submits comments to the Secretary not later than 30 days after the application is submitted, or, if the agency requests more time within those 30 days, within a period the Secretary establishes, the Secretary shall consider those comments before taking final action on the application.

(4) A loan agreement under this subsection shall provide that a capital project on the property will be started not later than 10 years after the fiscal year in which the agreement is made. If an interest in property acquired under this subsection is not used for the purpose for which it was acquired, an appraisal of the current value of the property or interest shall be made when a decision is made about the use. The decision shall be made within the 10-year period. Two-thirds of the increase in value shall be paid to the Secretary of Transportation for deposit in the Treasury as miscellaneous receipts.

(5) A loan under this subsection must be repaid not later than 10 years after the date of the loan agreement or on the date a grant agreement for a capital project on the property is made, whichever is earlier. Payments made to repay the loan shall be deposited in the Treasury as miscellaneous receipts.

(c) **Consideration of decreased commuter rail transportation.** – The Secretary of Transportation shall consider the adverse effect of decreased commuter rail transportation when deciding whether to approve a grant or loan under this section to acquire a rail line and all related facilities –

(1) owned by a rail carrier subject to reorganization under title 11; and

(2) used to provide commuter rail transportation.

(d) **Project as part of approved program of projects.** – Except as provided in subsections (b)(2) and (e) of this section, the Secretary of Transportation may approve

a grant or loan for a project under this section only after finding that the project is part of the approved program of projects required under sections 5303-5306 of this title and that an applicant –

(1) has or will have the legal, financial, and technical capacity to carry out the project, satisfactory continuing control over the use of equipment or facilities, and the capability to maintain the equipment or facilities; and

(2) will maintain the equipment or facilities.

(e) Criteria for grants and loans for fixed guideway systems. – (1) This subsection applies to a project –

(A) for which a letter of intent or contract for the complete amount is issued under subsection (g) of this section after April 1, 1987; or

(B) not in the preliminary engineering, final design, or construction stage on January 1, 1987.

(2) The Secretary of Transportation may approve a grant or loan under this section for a capital project for a new fixed guideway system or extension of an existing fixed guideway system only if the Secretary determines that the proposed project is –

(A) based on the results of an alternatives analysis and preliminary engineering;

(B) justified based on a comprehensive review of its mobility improvements, environmental benefits, cost effectiveness, and operating efficiencies; and

(C) supported by an acceptable degree of local financial commitment, including evidence of stable and dependable financing sources to construct, maintain, and operate the system or extension.

(3) In making a decision under paragraph (2) of this subsection, the Secretary of Transportation shall –

(A) consider the direct and indirect costs of relevant alternatives;

(B) account for costs related to factors such as congestion relief, improved mobility, air pollution, noise pollution, congestion, energy consumption, and all associated ancillary and mitigation costs necessary to carry out each alternative analyzed;

(C) identify and consider mass transportation supportive existing land use policies and future patterns;

(D) consider the degree to which the project increases the mobility of the mass transportation dependent population or promotes economic development; and

(E) consider other factors the Secretary considers appropriate to carry out this chapter.

(4)(A) The Secretary of Transportation shall issue guidelines on how the Secretary will evaluate results of alternatives analysis, project justification, and the degree of local financial commitment.

(B) The project justification under paragraph (1)(B) of this subsection shall be adjusted to reflect differences in local land, construction, and operating costs.

(C) The degree of local financial commitment is acceptable only if –

(i) the proposed project plan provides for the availability of contingency amounts the Secretary of Transportation determines to be reasonable to cover unanticipated cost overruns;

(ii) each proposed local source of capital and operating financing is stable, reliable, and available within the proposed project timetable; and

(iii) local resources are available to operate the overall proposed mass transportation system (including essential feeder bus and other services necessary to achieve the projected ridership levels) without requiring a reduction in existing mass transportation services to operate the proposed project.

(D) In assessing the stability, reliability, and availability of proposed sources of local financing, the Secretary of Transportation shall consider –

(i) existing grant commitments;

(ii) the degree to which financing sources are dedicated to the purposes proposed; and

(iii) any debt obligation that exists or is proposed by the recipient for the proposed project or other mass transportation purpose.

(5) A proposed project may advance from alternatives analysis to preliminary engineering only if the Secretary of Transportation finds that the project meets the requirements of this section and there is a reasonable chance that the project will continue to meet the requirements at the end of preliminary engineering.

(6)(A) A new fixed guideway system or extension of an existing fixed guideway system is not subject to the requirements of this subsection, and the simultaneous evaluation of similar projects in at least 2 corridors in a metropolitan area may not be limited, if –

(i) the project is located in an extreme or severe nonattainment area and is a transportation control

measure (as defined by the Clean Air Act (42 U.S.C. 7401 et seq.)) required to carry out an approved State Implementation Plan; or

(ii) assistance provided under this section is less than $25,000,000 or one-third of the total cost of the project or an appropriate program of projects as decided by the Secretary of Transportation.

(B) The simultaneous evaluation of projects in at least 2 corridors in a metropolitan area may not be limited and the Secretary of Transportation shall make decisions under this subsection with expedited procedures that will promote carrying out an approved State Implementation Plan in a timely way if a project is –

(i) located in a nonattainment area that is not on extreme or severe nonattainment area;

(ii) a transportation control measure (as defined by the Clean Air Act (42 U.S.C. 7401 et seq.)); and

(iii) required to carry out the State Implementation Plan.

(C) This subsection does not apply to a part of a project (including a commuter rail transportation project on an existing right of way) financed completely with amounts for highways made available under part A of title I of the Intermodal Surface Transportation Efficiency Act of 1991 (Public Law 102-240, 105 Stat. 1915).

(7) A project financed under this subsection shall be carried out through a full financing grant agreement.

(f) Required payments and eligible costs of projects that enhance urban economic development or incorporate private investment. – (1) Each grant or loan

under subsection (a)(5) of this section shall require that a person making an agreement to occupy space in a facility pay a reasonable share of the costs of the facility through rental payments and other means.

(2) Eligible costs for a project under subsection (a)(5) of this section –

(A) include property acquisition, demolition of existing structures, site preparation, utilities, building foundations, walkways, open space, and a capital project for, and improving, equipment or a facility for an intermodal transfer facility or transportation mall; but

(B) do not include construction of a commercial revenue-producing facility or a part of a public facility not related to mass transportation.

(g) Letters of intent, full financing grant agreements, and early systems work agreements. – (1)(A) The Secretary of Transportation may issue a letter of intent to an applicant announcing an intention to obligate, for a project under this section, an amount from future available budget authority specified in law that is not more than the amount stipulated as the financial participation of the Secretary in the project. The amount shall be sufficient to complete at least an operable segment when a letter is issued for a fixed guideway project.

(B) At least 30 days before issuing a letter under subparagraph (A) of this paragraph, the Secretary of Transportation shall notify in writing the Committee on Public Works and Transportation of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate of the proposed issuance of the letter.

(C) The issuance of a letter is deemed not to be an obligation under sections 1108(c) and (d), 1501, and 1502(a) of title 31 or an administrative commitment.

(D) An obligation or administrative commitment may be made only when amounts are appropriated.

(2)(A) The Secretary of Transportation may make a full financing grant agreement with an applicant. The agreement shall –

(i) establish the terms of participation by the United States Government in a project under this section;

(ii) establish the maximum amount of Government financial assistance for the project;

(iii) cover the period of time for completing the project, including a period extending beyond the period of an authorization; and

(iv) make timely and efficient management of the project easier according to the law of the United States.

(B) An agreement under this paragraph obligates an amount of available budget authority specified in law and may include a commitment, contingent on amounts to be specified in law in advance for commitments under this paragraph, to obligate an additional amount from future available budget authority specified in law. The agreement shall state that the contingent commitment is not an obligation of the Government. Interest and other financing costs of efficiently carrying out a part of the project within a reasonable time are a cost of carrying out the project under a full funding grant agreement, except that eligible costs may not be more than the cost of the most favorable financing

terms reasonably available for the project at the time of borrowing. The applicant shall certify, in a way satisfactory to the Secretary of Transportation, that the applicant has shown reasonable diligence in seeking the most favorable financing terms. The amount stipulated in an agreement under this paragraph for a fixed guideway project shall be sufficient to complete at least an operable segment.

(3)(A) The Secretary of Transportation may make an early systems work agreement with an applicant if a record of decision under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) has been issued on the project and the Secretary finds there is reason to believe –

(i) a full funding grant agreement for the project will be made; and

(ii) the terms of the work agreement will promote ultimate completion of the project more rapidly and at less cost.

(B) A work agreement under this paragraph obligates an amount of available budget authority specified in law and shall provide for reimbursement of preliminary costs of carrying out the project, including land acquisition, timely procurement of system elements for which specifications are decided, and other activities the Secretary of Transportation decides are appropriate to make efficient, long-term project management easier. A work agreement shall cover the period of time the Secretary considers appropriate. The period may extend beyond the period of current authorization. Interest and other financing costs of efficiently carrying out the work agreement within a reasonable time are a cost of carrying out the agreement, except that eligible costs may not be

more than the cost of the most favorable financing terms reasonably available for the project at the time of borrowing. The applicant shall certify, in a way satisfactory to the Secretary, that the applicant has shown reasonable diligence in seeking the most favorable financing terms. If an applicant does not carry out the project for reasons within the control of the applicant, the applicant shall repay all Government payments made under the work agreement plus reasonable interest and penalty charges the Secretary establishes in the agreement.

(4) The total estimated amount of future obligations of the Government and contingent commitments to incur obligations covered by all outstanding letters of intent, full financing grant agreements, and early systems work agreements may be not more than the greater of the amount authorized under section 5338(a) of this title to carry out this section or 50 percent of the uncommitted cash balance remaining in the Mass Transit Account of the Highway Trust Fund (including amounts received from taxes and interest earned that are more than amounts previously obligated), less an amount the Secretary of Transportation reasonably estimates is necessary for grants under this section not covered by a letter. The total amount covered by new letters and contingent commitments included in full financing grant agreements and early systems work agreements may be not more than a limitation specified in law.

(h) Government's share of net project cost. – Based on engineering studies, studies of economic feasibility, and information on the expected use of equipment or facilities, the Secretary of Transportation shall estimate the net project cost. A grant for the project is for 80

percent of the net project cost, unless the grant recipient requests a lower grant percentage. The remainder shall be provided in cash from a source other than amounts of the Government. Transit system amounts that make up the remainder must be from an undistributed cash surplus, a replacement or depreciation cash fund or reserve, or new capital. The remainder for a planned extension to a fixed guideway system may include the cost of rolling stock previously purchased if the applicant satisfies the Secretary that only amounts other than amounts of the Government were used and that the purchase was made for use on the extension. A refund or reduction of the remainder may be made only if a refund of a proportional amount of the grant of the Government is made at the same time.

(i) Loan term requirements. – Except for a loan under subsection (b) of this section, a loan, including a renewal or extension of the loan, may be made, and a security or obligation may be bought, only if it has a maturity date of not more than 40 years. Interest on a loan may not be less than –

(1) a rate the Secretary of the Treasury establishes, considering the current average yield on outstanding marketable obligations of the Government that have remaining periods of maturity comparable to the average maturity of the loan, adjusted to the nearest .125 percent; plus

(2) an allowance the Secretary of Transportation considers adequate to cover administrative costs and probable losses.

(j) **Loan payment forgiveness.** – A grant agreement for a capital project may forgive repaying the loan and

interest in place of a cash grant for the amount forgiven. The amount is part of the grant and part of the contribution of the Government to the cost of the project.

(k) Limitation on making loans and grants for projects. – The Secretary of Transportation may not make a loan under this section for a project for which a grant (except a relocation payment grant) is made under this section. However, the Secretary may make a project grant even though real property for the project has been or will be acquired through a loan under subsection (b) of this section.

(*l*) Fiscal capacity considerations. – If the Secretary of Transportation gives priority consideration to financing projects that include more than the non-Government share required under subsection (h) of this section, the Secretary shall give equal consideration to differences in the fiscal capacity of State and local governments.

(m) Allocating amounts. – **(1)** Of the amounts available for grants and loans under this section for each of fiscal years ending September 30, 1993-1997 –

(A) 40 percent is available for fixed guideway modernization;

(B) 40 percent is available for capital projects for new fixed guideway systems and extensions to existing fixed guideway systems; and

(C) 20 percent is available to replace, rehabilitate, and buy buses and related equipment and to construct bus-related facilities.

(2) At least 5.5 percent of the amounts available in each fiscal year under paragraph (1)(C) of this subsection is available for areas other than urbanized areas.

(3) Not later than January 20 of each year, the Secretary of Transportation shall submit to the Committee on Public Works and Transportation of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate a proposal on the allocation of amounts to be made available to finance grants and loans for capital projects for new fixed guideway systems and extensions to existing fixed guideway systems among applicants for those amounts.

(4) A person applying for, or receiving, assistance for a project described in clause (A), (B), or (C) of paragraph (1) of this subsection may receive assistance for a project described in another of those clauses.

(n) **Undertaking projects in advance.** – (1) The Secretary of Transportation may pay the Government's share of the net project cost to a State or local governmental authority that carries out any part of a project described in this section or a substitute transit project described in section 103(e)(4) of title 23 without the aid of amounts of the Government and according to all applicable procedures and requirements if –

(A) the State or local governmental authority applies for the payment;

(B) the Secretary approves the payment; and

(C) before carrying out the part of the project, the Secretary approves the plans and specifications for the part in the same way as other projects under this section or section 103(e)(4) of title 23.

(2) The cost of carrying out part of a project includes the amount of interest earned and payable on bonds issued by the State or local governmental authority

to the extent proceeds of the bonds are expended in carrying out the part. However, the amount of interest under this paragraph may not be more than the most favorable interest terms reasonably available for the project at the time of borrowing. The applicant shall certify, in a way satisfactory to the Secretary of Transportation, that the applicant has shown reasonable diligence in seeking the most favorable financial terms.

(3) The Secretary of Transportation shall consider changes in capital project cost indices when determining the estimated cost under paragraph (2) of this subsection.

***(o)* Use of deobligated amounts.** – An amount available under this section that is deobligated may be used for any purpose under this section.

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23 U.S.C. § 105. Programs

(a) As soon as practicable after the apportionments for the Federal-aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

(b) In approving programs for projects on the Federal-aid secondary system, the Secretary shall require that such projects be selected by the State highway department and the appropriate local officials in cooperation with each other, except in States where all public roads and highways are under the control and supervision of the State highway department such selection shall be made after consultation with appropriate local officials.

(c) In approving programs for projects on the Federal-aid primary system, the Secretary shall give preference to such projects as will expedite the completion of an adequate and connected system of highways interstate in character.

(d) In approving programs for projects on the Federal-aid urban system, the Secretary shall require that such projects be selected by the appropriate local officials with the concurrence of the State highway department of each State and, in urbanized areas, also in accordance with the planning process required pursuant to section 134 of this title.

(e) In approving programs for projects under this chapter, the Secretary may give priority of approval to, and expedite the construction of, projects that are recommended as important to the national defense by the Secretary of Defense, or other official authorized by the President to make such recommendation.

(f) In approving programs for projects on the Federal-aid systems pursuant to chapter 1 of this title, the Secretary shall give priority to those projects which incorporate improved standards and features with safety benefits.

(g) In preparing programs to submit in accordance with subsection (a) of this section, the State highway departments shall given consideration to projects providing direct and convenient public access to public airports, public ports for water transportation, new town communities, and new town-intown communities, and in approving such programs the Secretary shall give consideration to such projects.

(h) In preparing programs to submit in accordance with subsection (a) of this section, the State highway departments may given priority to projects for the reconstruction, resurfacing, restoration, or rehabilitation of highways which are incurring a substantial use as a result of transportation activities to meet national energy requirements and which will continue to incur such use, and in approving such programs the Secretary may give priority to such projects.

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23 U.S.C. § 134. Transportation planning in certain urban areas

(a) It is declared to be in the national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective, the Secretary shall cooperate with the State and local officials in the development of transportation plans and programs which are formulated on the basis of transportation needs with due consideration to comprehensive

long-range land use plans, development objectives, and overall social, economic, environmental, system performance, and energy conservation goals and objectives, and with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. The planning process shall include an analysis of alternative transportation system management and investment strategies to make more efficient use of existing transportation facilities. The process shall consider all modes of transportation and shall be continuing, cooperative, and comprehensive to the degree appropriate based on the complexity of the transportation problems. After July 1, 1965, the Secretary shall not approve under section 105 of this title any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section. No highway project may be constructed in any urban area of fifty thousand population or more unless the responsible public officials of such urban area in which the project is located have been consulted and their views considered with respect to the corridor, the location, and design of the project.

(b)(1) Within one year after enactment of this subsection, in the absence of State law to the contrary, units of general purpose local government within an urbanized area or contiguous urbanized areas for which a metropolitan planning organization has been designated prior to enactment of this subsection, may be agreement of at least 75 per centum of the units of general purpose local

government representing at least 90 per centum of the population of such urbanized area or areas, and in cooperation with the Governor, redesignate as the metropolitan planning organization any representative organization.

(2) Except as provided in paragraph (1), after the date of enactment of this subsection designations of metropolitan planning organizations shall be by agreement among the units of general purpose local government and the Governor.

(c) The Secretary may define those contiguous interstate areas of the Nation in which the movement of persons and goods between principal metropolitan areas, cities, and industrial centers has reached, or is expected to reach, a critical volume in relation to the capacity of existing and planned transportation systems to efficiently accommodate present transportation demands and future growth. After consultation with the Governors and responsible local officials of affected States, the Secretary may by regulation designate, for administrative and planning purposes, as a critical transportation region or a critical transportation corridor each of those areas which he determines most urgently require the accelerated development of transportation systems embracing various modes of transport, in accordance with purposes of this section. The Secretary shall immediately notify such Governors and local officials of such designation. The Secretary may, after consultation with the Governors and responsible local officials of the affected States, provide by regulation for the establishment of planning bodies to assist in the development of coordinated transportation planning, including highway planning, to meet the needs

of such regions or corridors, composed of representatives of the affected States and metropolitan areas, and may provide assistance including financial assistance to such bodies. There is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, not to exceed $500,000 to carry out this subsection.

MOTION FILED
FEB 19 2002

(3)

No. 01-1054

IN THE

Supreme Court of the United States

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, *et al.*,

Petitioners,

v.

LABOR/COMMUNITY STRATEGY CENTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion Of *Amici Curiae* Foothill Transit, Antelope Valley Transit Authority, Montebello Bus Lines, City of Azusa, City of Baldwin Park, City of Claremont, City of Diamond Bar, City of Lancaster, City of Monrovia, City of Montebello, City of San Dimas, City of Santa Monica, and City of Walnut For Leave To File Brief *Amici Curiae* In Support Of Petition For A Writ Of Certiorari And Brief *Amici Curiae*

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MOTION FOR LEAVE TO FILE

Foothill Transit, Antelope Valley Transit Authority, Montebello Bus Lines, and the Cities of Azusa, Baldwin Park, Claremont, Diamond Bar, Lancaster, Monrovia, Montebello, San Dimas, Santa Monica and Walnut ("*amici*") hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief of *amici curiae* in support of the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit. *Amici* are filing this motion because, although Petitioners and Respondents consented to the filing of an *amicus curiae* brief by Foothill Transit, the additional *amici* sought to join the proposed brief after that consent was given. At that time, it was too late to obtain new consents from the parties. A copy of the proposed brief is attached.

As more fully explained at pages 1-3 of the attached brief under "Statement of Interest of *Amici Curiae*," *amici* are operators of scheduled bus services and cities within greater Los Angeles County. All may suffer funding losses and significant disruption in their transportation services should the district court's order remain in effect.

This brief will assist the Court in determining whether to grant *certiorari* because *amici* are uniquely suited to explain the far-reaching implications of the district court's order and the Ninth Circuit's opinion, which override important principles of federalism. Particularly, *amici* have a special perspective from which to address: (1) the need for this Court to grant *certiorari* to protect state choice whether to participate in cooperative federalism programs which provide the federal funding that is the lifeblood of numerous state and local operations; and (2) the almost unlimited power that the Ninth Circuit decision gives district courts to exercise remedial powers against state and local agencies that enter into voluntary consent decrees without admitting to or being found in violation of federal law.

Accordingly, a*mici* respectfully request that the Court grant leave to file the attached brief *amici curiae*.

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STATEMENT OF INTEREST OF THE *AMICI*

Amici Foothill Transit, Antelope Valley Transit Authority, Big Blue Bus, Montebello Bus Lines, and the Cities of Azusa, Baldwin Park, Claremont, Diamond Bar, Lancaster, Monrovia, Montebello, San Dimas, Santa Monica and Walnut (*"amici"*) are not parties to the consent decree at issue in this case.[1] Nor are any of the thousands of bus riders who use their services each weekday. Yet the Ninth Circuit's decision affirming the order of the district court in this case may significantly affect the *amici*'s and other transportation services, and the riders who depend on these services.[2]

Foothill Transit, Antelope Valley Transit Authority, Montebello Bus Lines, and the cities of Claremont and Santa Monica (the "bus operator *amici*") operate scheduled bus services. These *amici* coordinate their bus service operations with the overlapping services provided by Petitioner, the Los Angeles County Metropolitan Transportation Authority ("MTA").

The municipalities of Azusa, Baldwin Park, Claremont Diamond Bar, Lancaster, Monrovia, Montebello, San Dimas, Santa Monica and Walnut (the "city *amici*") are cities within greater Los Angeles County that provide various forms of van and bus transit services and transit-related infrastructure projects to their citizens. These *amici* also coordinate their transit operations with MTA as part of a cooperative effort to provide an integrated transportation network for all of Los Angeles County.

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1. This brief was authored entirely by counsel for *amici*, and *amici* have borne all costs associated with this brief. No party or other person or entity made a monetary contribution to the preparation or submission of the brief.

2. None of the *amici* operate rail services.

Because of the manner by which MTA allocates money to the *amici*, a substantial drain on MTA's funding undoubtedly will drain funding from the *amici*. Tens of millions of dollars of funding for the *amici*'s transportation services — the regularly scheduled bus services run by the bus operator *amici* and the van and bus-transit services run by the city *amici* — come from Los Angeles County Propositions A and C. Each of these Propositions instituted a one-half cent sales tax in Los Angeles County earmarked for public transportation. As part of its authority, MTA controls a substantial pool of these funds and disperses them to the *amici*.

The Ninth Circuit ruling challenged here affirms a remedial order that will cost MTA many millions of dollars to implement. If MTA attempts to take Proposition A and C funds it otherwise would distribute to the *amici* to satisfy MTA's court-ordered obligations, less funding would be available to the *amici*.[3] This development would be disastrous to the *amici* and to the residents who depend on *amici*'s transportation services.

Not only will the *amici* potentially lose essential funding, but the district court's order jeopardizes the cooperative relationship between the *amici* and MTA which jointly provide an interconnected bus network for residents who travel beyond or near the boundaries of MTA's service area. Complex transportation services like the ones the *amici* provide do not operate in vacuums. Overlapping bus services,

3. According to the Special Master, "the Consent Decree requires that the MTA "reprogram funds, which may include, but not be limited to, revenues from Proposition A and C discretionary funds" if it fails to meet its targets. App D, at 51. Thus, there is a very real prospect that MTA will use for its own needs funding upon which the *amici* depend.

and even localized services such as shuttles and city-operated vans that transport the disabled, depend on coordination between the *amici* and MTA. Together, they forge an interrelated transportation system for citizens in Los Angeles County and outlying regions. The district court order threatens to derail these services. Without considering the possible effects on the *amici*, the district court proposed that the Special Master "consider the movement of buses from less crowded lines, and the possibility of reducing or eliminating MTA service to those municipalities served by the sixteen municipal bus lines that offer overlapping service to the service provided by the MTA." App. C, at 48. Were the Special Master to reduce or eliminate MTA bus services as suggested, the burden would fall on the *amici*, who would be forced to provide replacement or supplemental services to the displaced riders, without receiving additional funding with which to pay for such services.

INTRODUCTION

This is a case about federalism. Specifically, it is a case about the federalism-based limits on the remedial powers of a federal court to enforce a voluntary consent decree.[4]

This Court's precedents make crystal clear that federalism principles require that federal courts "exercise the least possible power adequate to the end proposed" when issuing remedial orders that substantially affect state and local decision-making. *Spallone v. United States*, 493 U.S. 265, 280 (1990) (internal quotations omitted). Courts "must be

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4. By "voluntary," we mean a consent decree where the signing party has neither admitted a violation of law nor has been adjudicated to have violated a law.

constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). Particularly when dealing with state agencies empowered to administer complex state and municipal institutions, federal courts should hesitate before substituting their judgments for those of the agencies. *E.g., Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (recognizing that operating state prison is "peculiarly within the province of the legislative and executive branches of government").

The Ninth Circuit has run roughshod over this Court's federalism jurisprudence. Simply put, its decision here instructs district courts that federalism places *no* meaningful restraints on the exercise of their remedial power for violations of consent decrees, and even authorizes these courts to order a state agency to sacrifice its participation in cooperative federalism programs.[5]

More specifically, the Ninth Circuit's opinion announces two principles of law that cannot be squared with this Court's jurisprudence. First, although this Court has held that federal law must preserve a state's freedom of choice about participating in a cooperative federalism program, the Ninth Circuit holds that a district court, in fashioning a consent decree remedy, may strip a state agency of its choice to participate in such a program.

5. At the outset, it should be noted that the violation of the consent decree at issue is not a violation of the law. Rather, it is an alleged violation of the express terms of the consent decree, which provided that MTA would meet specified load factor targets on MTA's buses. App. A, at 3-11. At most, this is a violation of contract, and even that technical language was subject to different interpretations. App. A, at 7, n.2.

Second, the Ninth Circuit incorrectly holds that a local agency settling litigation through a consent decree (even when it does so on its own initiative without any adjudication or admission of wrongdoing) thereby waives all federalism-based objections to whatever remedies a district court might devise for violations of that decree. This ruling simply cannot be squared with this Court's decisions declaring that federal courts, when considering remedies against state agencies for actual violations of federal law, must consider the federalism interest of those agencies. Under the Ninth Circuit's illogical approach, state agencies that have violated no law enjoy less protection from federalism principles than agencies found to have violated the law.

The Ninth Circuit's rulings on cooperative federalism and consent decree waiver have drastic implications. By authorizing federal courts to order state agencies to forgo the federal funding they receive from cooperative federalism programs, the Ninth Circuit has put in jeopardy the lifeblood of hundreds of local and state agencies nationwide. And by instructing state and local agencies that they will automatically waive their federalism-based rights whenever they sign a consent decree, the Ninth Circuit has created a powerful disincentive for entering into consent decrees, and, thus, put in jeopardy the most important and effective means for settling civil rights and other institutional litigation.

In order to conform the law of the Ninth Circuit with this Court's rulings, and to avoid the serious and widespread practical consequences of the Ninth Circuit's decision, we urge this Court to grant the Petition for Certiorari.

ARGUMENT

I. THOUGH *SOUTH DAKOTA v. DOLE* REQUIRES THAT STATES RETAIN THE CHOICE TO PARTICIPATE IN COOPERATIVE FEDERALISM PROGRAMS, THE NINTH CIRCUIT AUTHORIZES DISTRICT COURTS TO STRIP STATES OF THAT CHOICE

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), this Court held that federal financial incentives designed to influence state policy choices may comport with principles of cooperative federalism because they "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* at 17. More recently, in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), the Court applied *Pennhurst* in recognizing that choice is essential to programs by which Congress employs its spending "power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *Dole*, 483 U.S. at 206 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)). For such cooperative federalism programs to remain constitutional, however, it is critical that "the residents of the State retain the ultimate decision as to whether or not the State will comply" with federal funding mandates. *New York v. United States*, 505 U.S. 144, 167-69 (1992).

The Ninth Circuit, in its cavalier treatment of federalism concerns, turns these precedents upside-down. While this Court's decisions make a state's freedom of choice the *sine qua non* of cooperative federalism programs, the Ninth Circuit holds that, precisely because a state has that freedom

of choice, a district court may strip it of that choice. According to this convoluted reasoning, losing the chance to participate in cooperative federalism programs does not implicate any federalism principle unless the district court's order requires a local agency to violate federal law; failing to satisfy funding requirements, in the Ninth Circuit's opinion, is not such a violation. Thus, in rejecting MTA's claim that the district court overstepped its authority in fashioning a remedy that jeopardizes MTA's participation in cooperative federalism, the Ninth Circuit blithely declared:

> [T]he federal and state laws to which MTA refers are simply funding provisions with which MTA *may* choose to comply. The reward for compliance is state and federal funding. However, failure to follow the requirements of the funding mandates is not a violation of law. At most, [the district court's order] might disqualify MTA from entitlement to receive funds. . . . *See South Dakota v. Dole*, 483 U.S. 203 (1987) (emphasis added).

App. A, at 19-20.

As Judge Cynthia Holcomb Hall recognizes in her dissent, the majority's endorsement of a district court's unilateral power to abrogate a state's participation in such programs conflicts with the principles underlying cooperative federalism and flies in the face of this Court's jurisprudence:

> The consensual nature of these schemes is precisely the reason why their constitutionality is not open to question. *See generally South Dakota v. Dole*, 483 U.S. 203 (1987). Here, however, the remedial order took that choice out of MTA's

> hands and in effect required MTA to take a certain position regarding federal policy. Where the state or local government unambiguously agrees to forego federal funds in the consent decree itself, fewer federalism concerns arise; when the state or local government agrees to the terms of the consent decree, it makes a choice to not participate in the federal program. But where a federal court's remedial order prevents participation in the funding scheme, the state or local government is denied its choice. In taking away that choice, the district court effectively shifts power from the state to a single branch of the federal government.

App B., at 40.

Judge Hall's logic is impeccable. Without apparent irony, the Ninth Circuit has now authorized district courts to do exactly what *Dole* and other cases forbid Congress to do — namely, to strip a state of the choice whether to participate in cooperative federalism programs.

The Ninth Circuit's logic, by contrast, makes no sense whatsoever. The challenge MTA presented to that Court was whether a district court could impose a remedy that forced a local agency to forego federal funding provided through a cooperative federalism program. The Ninth Circuit's answer — that under *Dole* the district court did not require MTA to violate federal law — is no answer at all. The power of a federal court to order a state agency to violate federal law is not the question here; the question is whether a federal court may exercise its remedial powers to deprive a local agency of the freedom of choice guaranteed by this Court's federalism jurisprudence. And by focusing on the wrong

issue, the Ninth Circuit has left the federalism interests of states and local entities unrecognized and unprotected.

Importantly, the Ninth Circuit's flouting of local authority is likely to have widespread practical consequences for the operation of state and local agencies such as MTA. Through funding mandates, Congress holds out a carrot to state governments. By agreeing to comply with conditions these federal laws impose, states may receive vitally important federal funding through a system that is "replicated in numerous federal statutory schemes." *New York v. United States*, 505 U.S. at 167 (citing the Clean Water Act, the Occupational Safety and Health Act, the Resource Conservation and Recovery Act of 1976, and the Alaskan National Interest Lands Conservation Act as examples). Hundreds of millions of dollars are provided to the states under these statutory schemes, and they form a substantial portion of the budgets of state agencies including, as here, local transportation authorities.[6] Recognizing the critical importance of federal funding, the California state legislature has ordered local transportation entities to "take all action necessary to obtain the maximum amount of funding available" in the form of discretionary grants from the United States Department of Transportation. Cal. Pub. Util. Code § 130305.[7]

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6. For instance, for fiscal year 2002, federal grants will make up approximately $441 million of the MTA's budget. By comparison, projected revenue from fares amounts to only $243 million of the MTA's 2002 budget.

7. Section 130305 of the California Public Utilities Code states that the Public Utilities Commission shall take all action necessary to obtain funds pursuant to 49 U.S.C. § 1602. The provisions of section 1602 has since been incorporated into 49 U.S.C. § 5309.

In short, the Ninth Circuit's decision potentially allows a federal district court to wreak havoc with any local agency that enters into a consent decree. And that raises another fundamental issue of federalism repeatedly emphasized in this Court's rulings. As Judge Hall recognizes, "taking the decision . . . out of MTA's hands . . . raise[s] troubling political accountability concerns." App. B, at 40-41.

These concerns flow directly from this Court's decision in *New York v. United States*, which explained that, by giving states the choice of complying with federal funding mandates, "state governments remain responsive to the local electorate's preferences." *New York v. United States*, 505 U.S. at 168. In other words, if the citizens do not like the choice, they may elect officials who will better represent the citizens' interests. *Id.* If, however, the federal government strips the state of that choice, "the accountability of both state and federal officials is diminished." *Id.* When Congress supplants the authority of state agencies:

> [I]t may be state officials who will bear the brunt of public disapproval, while the federal officials . . . remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id. at 169. By the same logic, when a federal court strips a state of choice, accountability also is diminished. *Cf. O'Brien v. Massachusetts Bay Transportation Authority*, 162 F.3d 40, 44 (1st Cir. 1998) ("it is difficult to fathom . . . how forcing a state agency to forego billions of dollars in federal subsidies

would render its hierarchs more accountable to the citizenry").[8] That is precisely what happened here.

By denying states their freedom of choice to participate in cooperative federalism programs, the Ninth Circuit has effectively sanctioned exactly the shift in political accountability this Court's decisions warn against. If the district court's order results in an overall decline in transportation service or a fare increase[9] or if it causes

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8. *O'Brien* is not directly in conflict with the Ninth Circuit, because, although it also involved federal funding, it was decided on the settled ground that federal courts have no power to enforce state constitutions. *Pennhurst*, 451 U.S. 1. In *O'Brien*, the First Circuit refused to enjoin a state agency from accepting federal transportation funds because the conditions to acceptance of those funds might conflict with the Massachusetts Declaration of Rights. What is instructive, however, is that the court recognized that depriving the state of federal funds would leave the state with unappetizing options for making up the shortfall such as raising taxes, laying off employees, and ceasing construction and improvements. *Id.* *O'Brien* said that a federal court should not place states in that position. "[I]f such dire remedies are to be implemented, that is a decision for Massachusetts to make, not for a federal court to impose." *Id.*

9. Ironically, as Judge Hall explains, the majority fails to consider that the loss of funding as a result of the remedial measures might threaten MTA's ability to comply with the remedial order. App. B, at 39-40. Consistent with the lip service it pays to cooperative federalism, the majority never considers where MTA is supposed to find the money to purchase and operate hundreds of new buses. As a practical matter, this is a significant consideration. Implicit in cases like *Dole* and *New York v. United States* is the notion that a state, when it exercises its choice to forego federal funding, can make up those funds through other means. *New York v. United States*, 505 U.S. at 168; *see also O'Brien*, 162 F.3d at 44 (discussing how state would have to find a way to make up for loss of transportation funds if ordered to forego federal funding).

problems outside the field of transportation, local officials will bear the brunt of their constituents' displeasure even though responsibility for these problems will properly lie with the district court. This basic unfairness that the Ninth Circuit has sanctioned is undemocratic and unconstitutional.

II. IN RULING THAT A PARTY TO A CONSENT DECREE WAIVES ALL MEANINGFUL FEDERALISM OBJECTIONS TO A DISTRICT COURT'S REMEDIAL AUTHORITY, THE NINTH CIRCUIT FLOUTS THIS COURT'S PRECEDENTS, VIOLATES BASIC NOTIONS OF JUDICIAL RESTRAINT, AND DISCOURAGES THE SETTLEMENT OF LITIGATION

In keeping with its total disregard of federalism concerns, the Ninth Circuit's decision contains a second and equally problematic holding. According to the Ninth Circuit, whenever a local agency signs a consent decree, even on a voluntary basis, it automatically waives its federalism objections to whatever remedial measures a district court might order for alleged violations of the decree.

The Ninth Circuit's holding cannot be reconciled with this Court's precedents. As this Court has made clear, even an agency that has violated the Constitution may still challenge an exercise of remedial power on federalism grounds. In *Milliken v. Bradley*, 433 U.S. 267 (1977), for example, this court held that a district court fashioning a remedial decree for an adjudicated violation of the equal protection clause "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.* at 280-81; *see also Missouri v. Jenkins*, 495 U.S. 33, 50-51 (1990). In short, federalism is one of the indispensable "equitable principles" that a district court must observe in exercising its remedial power. *Milliken*, 433 U.S. at 280.

Paradoxically, under the Ninth Circuit's holding, a party that voluntarily enters into a consent decree without admitting or being found to have violated any law enjoys less federalism-based protection than a party actually found in violation of federal law. According to the Ninth Circuit, the mere act of a state agency signing a consent decree in the spirit of compromise "relieves many federalism concerns." This is particularly true with respect to a district court's power to remedy violations of the terms of the consent decree. In this respect, once a state agency "consents to this form of dispute resolution," its federalism interest in managing its own affairs is completely satisfied so long as the district court, in exercising its remedial powers, permits the agency to submit a proposed remedy. App. A, at 19. In other words, the district court is relieved of all federalism constraints in fashioning a remedy if it permits a state agency to submit a proposal, which the court is free to reject — as it did here. In sum, under the Ninth Circuit's decision, by signing a consent decree, a state agency waives all substantive federalism objections to a district court's authority to fashion remedies for violations of that decree.

Here, the Ninth Circuit betrays a fundamental misunderstanding of waiver in the context of a consent decree. Naturally, when a party signs a consent decree, it waives objections to the actual terms of that agreement. But the act of signing a voluntary consent decree does not waive federalism-based objections to remedies not contained in the decree itself.[10]

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10. This is particularly relevant here, because the consent decree in this case nowhere requires MTA to purchase buses if it fails to meet a load factor target. *See generally* Petition for a Writ of Certiorari of Petitioner Los Angeles County Metropolitan Transportation Authority, at 3-5, 13-15. For this reason, any purported waiver is

(Cont'd)

To hold otherwise (as the Ninth Circuit has) is to confuse the actual terms of a decree with the lawful means by which a court may remedy alleged violations. As a result, despite the principles of judicial restraint that highlight this Court's federalism jurisprudence, the Ninth Circuit has sanctioned the exercise of virtually unlimited judicial power against state and local agencies when enforcing consent decrees.

Missouri v. Jenkins illustrates the error in the Ninth Circuit's approach. In *Jenkins*, after a lengthy trial a state and local school district were found to have operated a segregated school district. *Id.* at 37. To eliminate the vestiges of discrimination, the district court directly ordered a tax increase to finance a desegregation plan. *Id.* at 38-42. On appeal, this Court reversed this portion of the order because it "contravened the principles of comity that must govern the exercise of the District Court's equitable discretion." *Id.* at 50. Moreover, "although the 'remedial

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(Cont'd)

unlike the waiver applied in the *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), *rev'd sub nom on other grounds, Spallone v. United States*, 493 U.S. 265 (1990), a case upon which the Ninth Circuit relies. In *Yonkers*, the city entered into a consent decree that expressly and specifically mandated that it pass implementing legislation to build public housing. When it failed to comply, the district court held the city council in contempt until it passed that legislation. On appeal, the Second Circuit held that the city council could not assert federalism objections to the district court's order which simply "was carrying out the terms of the Consent Judgment." *Id.* at 454. "By its approval of the Consent Judgment, the City Council itself selected the remedy of implementing legislation and cannot complaint that the District Court approved the agreement." *Id.* This is very different than the current case where the district court approved a remedy selected by a special master that is not set forth in the express terms of the agreement.

powers of an equity court must be adequate to the task, . . . they are not unlimited,' . . . and one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions."[11] *Id.* at 51 (quoting *Whitcomb v. Chavis*, 403 U.S. 124 (1971)).

As noted above, *Jenkins* is not alone in applying federalism principles to a district court's choice of remedies after finding a federal law violation. Although in *Milliken*, this Court upheld a district court's remedial order in the context of an adjudicated constitutional violation, this Court emphasized the "inherent limitations[s] upon federal judicial authority" and demanded that they consider the state's federalism interests when imposing remedies. *Milliken*, 433 U.S. at 280-82; *see also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992) ("Federal courts may not order States or local governments, over their objections, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated.")

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11. In *Jenkins*, in a portion of the opinion supported by a five-to-four majority, this Court did hold that the district court would have the power to issue an order requiring a school district to raise taxes above state-imposed tax limits "where there is a reason based in the Constitution for not observing the statutory limitation." *Jenkins*, 495 U.S. at 52-58. In rejecting the majority's decision on this point, Justice Kennedy, in a concurrence, argued that the "casual embrace of taxation imposed by the unelected, life-tenured Federal Judiciary disregards fundamental precepts for the democratic control of public institutions." *Id.* at 58-59 (Kennedy, J., concurring). As Justice Kennedy explained, "federalism concerns" counseled "against the [majority's] analysis." *Id.* at 68 (Kennedy, J., concurring). Indeed, when "judicial discretion is to provide the sole limit on judicial remedies, that discretion must counsel restraint." *Id.* at 75 (Kennedy, J., concurring).

As these cases establish, courts must consider federalism concerns and exercise judicial restraint when imposing remedies even for found constitutional violations. *A fortiorari*, those same principles must apply when a federal court imposes remedial measures pursuant to a voluntary consent decree in the absence of an admitted or adjudicated violation.[12] The *Milliken-Jenkins* line of cases simply does not square with the Ninth Circuit's holding that entry into a consent decree waives federalism objections to whatever remedies a district court might impose.

The consequences of the Ninth Circuit's overbroad waiver doctrine in the context of consent decrees will be serious and widespread. As this Court knows well, consent decrees play a critical role in the efficient and appropriate resolution of civil rights and institutional reform litigation. *E.g., Local 93*, 478 U.S. at 523-24, n.13 (explaining the benefits of consent decrees

12. Because federalism concerns remain even when a violation of federal law occurs, it would not change the analysis if the Ninth Circuit had effectively read the consent decree to admit a violation of federal law. Yet even if the existence of a violation were relevant, none exists here and none can be inferred. To read into the consent decree in this case such an admission or finding where none exists would be inconsistent with this Court's rulings in *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975) and *United States v. Armour & Co.*, 402 U.S. 673 (1971), that consent decrees "should be construed basically as contracts without reference to the legislation" that the plaintiffs "originally sought to enforce but never proved applicable through litigation." *ITT Continental Baking Co.*, 420 U.S. at 236-37; *also Armour*, 402 U.S. at 681-82 (because a consent decree is a "compromise" between the competing purposes of the parties, "the decree itself cannot be said to have a purpose"). "[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Local Number 93, International Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 522 (1986).

and recognizing that for the reasons specified, "consent decrees have become widely used as devices to facilitate settlement"). In ruling that state agencies entering into consent decrees waive their federalism objections to proposed district court remedies, the Ninth Circuit dramatically weakens this vital tool for dispute resolution. State and local agencies will be exceedingly reluctant to enter into consent decrees knowing that, by opting for settlement, they will be surrendering to a district court unlimited remedial authority over their budgets and operations. And, thus, in the absence of action by this Court, constructive solutions to civil rights and other institutional reform issues will too often give way to protracted, expensive, and divisive litigation. Such a result is not merely unfortunate; it contravenes the "expressed congressional preference for voluntary remedial action," *Id.* (noting that Title VII favors voluntary remedial action).

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that the Petition be granted.

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No. 01-1054

IN THE

Supreme Court of the United States

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, *et al.*,

Petitioners,

v.

LABOR/COMMUNITY STRATEGY CENTER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Neither of the Questions framed by the Petitioners is presented on the record made in this matter:

1. Contrary to Petitioners' contention that the majority below "disobey[ed]" decisions of this Court "by construing the [Consent] Decree solely as a judgment rather than as a contract for enforcement purposes," the record (including the critical ruling by the Special Master that Petitioners failed to include in the Appendix to their Petition) demonstrates indisputably that the Special Master, whose decisions were affirmed by the District Court and the Court of Appeals, in fact applied contract law principles to discern the obligations placed upon Petitioners by the Decree.

2. Petitioners' second Question — whether the remedy fashioned by the Special Master and approved by the District Court and the Court of Appeals violated principles of federalism by intruding upon Petitioners' discretionary authority — is founded upon factual assumptions (*i.e.*, that the remedy was not necessary to implement the Decree and was beyond Petitioners' financial capabilities) that were rejected by the Special Master and both courts below. These findings are not only *not* "clearly erroneous" but are well supported on the record. Under these circumstances, and because Petitioners have made no "very obvious and exceptional showing of error," this hypothetical question does not merit review by this court. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996), *quoting Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

PARTIES TO THE PROCEEDING

Petitioners state (Pet. at ii) that: "All parties appear in the caption of the case on the cover page." However, because that caption is both outmoded and in error, it does not provide a correct listing of parties to this proceeding. Taking into account the automatic substitution of officials of the corporate Petitioner Los Angeles County Metropolitan Transportation Authority pursuant to Fed. R. Civ. P. 25(d), as well as the erroneous listing of four individuals who sought, but were denied, intervention below *in 1994* (Henry Frederick Ramey, Jr., O. Howard Watts, William Tut Hayes, and Victor Dibas), the following is a proper listing of parties to the proceeding in this Court:

1. Bus Riders Union, a charitable, non-profit, non-stock corporation,* Respondent;

2. Pearl Daniels, Respondent;

3. Maria Guardado, Respondent;

4. Korean Immigrant Workers Advocates, a charitable, non-profit, non-stock corporation,* Respondent;

5. Labor/Community Strategy Center, a charitable, non-profit, non-stock corporation,* Respondent;

6. Los Angeles County Metropolitan Transportation Authority, Petitioner;

7. Roger Snoble, Chief Executive Officer of the Los Angeles County Metropolitan Transportation Authority, Petitioner;

8. Southern Christian Leadership Conference of Greater Los Angeles, a charitable, non-profit, non-stock corporation,* Respondent;

9. Naomi Zelada, Respondent; and

10. Ricardo Zelada, Respondent.

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*No parent or publicly held company therefore owns any stock in any of these corporations. See Sup. Ct. R. 29.6.

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COUNTER-STATEMENT OF THE CASE

Petitioners' Statement is replete with self-serving and incorrect assertions, factual omissions, and misrepresentations of the record, all unsupported by record citation. We limit our comments on such matters to those "that bear[ ] on what issues properly would be before the Court if certiorari were granted," Sup. Ct. R. 15.2.

1. Background of the Proceeding. This action was filed by Respondents on August 31, 1994, seeking "permanently to enjoin the [Petitioners] from operating a discriminatory two tier, separate and unequal system of public transportation--one for poor minority bus riders and another designed to serve predominantly white and relatively wealthy rail riders" (Complaint, ¶ 5). As the majority opinion below summarized (Pet. 3a[1]):

> The suit alleged that MTA was spending a disproportionately large portion of its budget on rail lines and suburban bus systems that would primarily benefit white suburban commuters, while intentionally neglecting inner-city and transit-dependent minority bus riders who relied on the city bus system. The lawsuit was triggered by MTA's decision to spend several hundred million dollars on a new rail line, foregoing an opportunity to reduce overcrowding problems on city buses, while at the same time increasing bus fares and eliminating monthly discount passes.

On September 21, 1994, the District Court granted preliminary

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[1]Citations in this form are to the separately bound Appendix to Petition for a Writ of Certiorari.

injunctive relief to Respondents.[2] "In October 1996, after over two years of discovery and just before a trial was scheduled to

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[2]The District Court made the following Findings and Conclusions supporting its actions:

> 6. Plaintiffs have presented the Court with more than sufficient evidence to meet their burden of preliminarily showing that MTA's actions have adversely impacted minorities; that MTA's actions were not justified by business necessity; and that the MTA has rejected less discriminatory alternatives.
>
> 7. Through their evidence, plaintiffs raise serious questions going to the merits of their disparate impact claim under Title VI, as well as their intentional discrimination claim under Title VI, the Fourteenth Amendment, and 42 U.S.C. §§ 1981 and 1983. A serious question is one that is so substantial and difficult as to warrant more deliberate investigation and, thus, creates a fair basis for litigation. *County of Alameda v. Weinberger*, 520 F.2d 344, 349-50, n.12 (9th Cir. 1975).
>
> 8. MTA, however, has not come forward with sufficient evidence to rebut the plaintiffs' initial evidentiary showing. Rather, MTA provided the Court with mere conclusory statistics without identifying the source or age of the raw data used to reach the statistical results and without specifying the methodology used to gather the data.

Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority, No. CV 94-6936 TJH (MCx), Findings of Fact and Conclusions of Law re: Preliminary Injunction, at 4-5 (C.D. Cal. Sept. 21, 1994). Compare Petitioners' claim that following commencement of this lawsuit, "MTA produced substantial evidence in the district court that the assumed [*sic*] disparity in the treatment of people of color and white bus and train riders was nonexistent. Respondents introduced no contrary evidence." (Pet. at 2 n.1.)

begin, the parties reached a settlement and submitted to the district court a proposed consent decree that set forth a detailed plan to improve bus service" (Pet. 3a).

2. **The Consent Decree.** The Decree, which was approved by the District Court, contains a set of "Basic Principles and Objectives" which MTA promised to "work with representatives of the plaintiffs' class in implementing" (Pet. 173a-174a), specific "Service Improvements" to be undertaken by Petitioners (Pet. 175a-179a), and provisions for maintaining or modifying MTA's fare structure (Pet. 180a-182a), as well as sections concerning implementation and enforcement of the Decree, etc.[3] The present proceeding principally concerns one part of the "Service Improvements" section of the Decree: "Reducing [Bus] Overcrowding By Adding New Service" (Pet. 175a-177a), containing four paragraphs, each of which bears upon the current controversy.

The first paragraph establishes intermediate and final goals for "reduction in levels of crowding on board buses," expressed as "reduction of the maximum load factor ceiling *for all bus routes*," with the first target reduction to be achieved by December 31, 1997 (Pet. 175a [emphasis added]).

The next paragraph delineates a precise definition of "load factors" to be used in measuring compliance:

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[3]For example, the Decree both required the establishment of a "Joint Working Group" ("JWG") with equal representation of both parties to assist in its implementation (Pet. 182a) and also appointed — subject to the District Court's approval, which was granted — the mediator who had assisted in the negotiation of the settlement as Special Master, to whom disputes arising under the Decree would be referred "for resolution, pursuant to procedures set forth by the Special Master," subject to review by the District Court (*id.* at 183a).

> 2. *Load Factor Definition.* "Peak load factor" shall mean (total number of passengers/total number of seats) which shall be determined by computing the highest ratio of total number of passengers to total number of seats achieved during any 20 minute weekday peak period in the peak direction of travel *on each bus line*. This load factor computation would be based on a one hour time interval during non-peak periods. Target load factors shall not be achieved by by-passing passengers at bus stops. MTA shall conduct ride checks to determine load factors using current MTA procedures and schedules. . . . The JWG may request that MTA collect additional data as appropriate to monitor compliance with the load factor targets.

(Pet. 175a-176a [emphasis added].)

The third paragraph places responsibility upon MTA to prepare, at least 90 days prior to the beginning of each fiscal year, a "plan to make available sufficient additional buses and other vehicles to meet these target load factors" and to take cognizance of such plans in any "scheduled modification to its long range plan" (Pet. 176a). It continues:

> If ridership shall increase by more than 15 percent *on any bus line* MTA shall nevertheless make its best efforts to meet *the target for that line* and *the target for that line* may be deferred for one (and only one) year.

(*Id.* [emphasis added].)

The final paragraph concerns any "Failure to Meet Targets" and it provides:

> 4. *Failure to Meet Targets.* If MTA fails to meet the target load factors *for all bus lines* by the dates in paragraph 1 above, (except those exempted or deferred under paragraph 3 above), MTA shall meet the

> target as soon as possible and reallocate sufficient funds from other programs to meet the next lower target load factor as scheduled. The reprogrammed funds, which may include but not be limited to revenues from Propositions A and C discretionary funds, shall be used to meet the target load factors. Any dispute concerning whether the targets have been met; or if the targets have not been met, whether sufficient funds have been reprogrammed to meet the next target will be reviewed by the JWG. ~~If~~ [If /s/ Bliss] the JWG cannot resolve the matter it will be referred to the Special Master. The failure of MTA to meet the target load factors shall not be deemed a changed or unforeseen factual condition for purposes of seeking a modification of this Consent Decree by MTA.

(Pet. 177a [emphasis added].)

3. **Enforcement Proceedings**. As the majority opinion below summarized,

> [S]oon after the first L[oad]F[actor]T[arget] deadline passed on December 31, 1997, the Special Master was pressed into service. The plaintiffs alleged that MTA had failed to meet the first LFT. In addition, the parties disputed the meaning of the LFTs, the extent to which MTA had or had not met its obligations under the consent decree, and the proper remedy to achieve compliance with the decree. . . . The Special Master set out a bifurcated procedure for resolving the matter. First, the parties were to brief the issue of how to measure compliance with the decree. Second, once the Special Master had determined a method for measuring compliance, the matter was to be referred back to the JWG to determine whether MTA had fulfilled its obligations, and to craft a remedial plan if it had not. If

> the JWG could not agree on a remedial plan, the parties would then submit their respective remedial proposals to the Special Master for resolution of the issue.

(Pet. 7a-8a [footnote omitted].) Accordingly, on June 29, 1998, the Special Master directed the parties to "submit simultaneous briefing on the following foundation legal issue":

> *Under the decree*, what is the concrete standard by which the Special Master is to measure compliance with the target load factor requirements?

(Opp. App.2a [4] [emphasis added].) MTA's brief, set out in the Appendix *infra* (Opp. App.41a-64a), in its very first sentence proposed that "[t]he primary task for the Special Master is to *devise* a standard by which to determine whether the MTA has complied with the target load factor requirements of the Consent Decree" (Opp. App. 45a [emphasis added]). MTA suggested a standard based on a survey of other bus transit operators that it had conducted in 1997, *after* the Consent Decree was submitted and approved (*see id.* at 50a).[5] Only once in its entire brief did MTA refer to the standard that was embodied in the language of the Consent Decree, which it urged the Special Master to reject:

> Under the vague standard existing in the Consent Decree, the MTA–by meeting the target in more than 97% of the periods monitored–has been in compliance with the load factor target requirements up to this point

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[4]Citations in this form are to the Appendix to this Brief in Opposition, *infra*.

[5]MTA proposed "that the standard for compliance should be a measurement of MTA's overall compliance rate, per time period, against the industry-wide percentage of service interruptions" (Opp. App. 11a).

> in time. If the Special Master adopts the criteria set forth herein, the MTA should be given a reasonable period of time to come into conformance with this *newly proclaimed* objective standard.

(Opp. App. 54a [emphasis added].)

On July 15, 1998, the Special Master entered an Order Re Standards for Compliance (Opp. App. 7a-23a) rejecting MTA's proposal. Pointing to the repeated references in the relevant portions of the Consent Decree to reductions in overcrowding for "all bus routes" and "all bus lines," and the absence of "language in the Consent Decree which provides for the possibility of averaging across multiple lines" (*id.* at 9a [underlining in original]), the Master specifically relied upon principles of contract interpretation in reaching his conclusion:

> In the absence of ambiguity, a court will interpret a contract or statute according to the clear, explicit meaning of the words used. *See e.g., Avemco Ins. Co. v. Davenport*, 140 F.3d 839, 842 (9th Cir. 1998); *Perrin v. United States*, 444 U.S. 37, 42 (1979). The preceding provisions [of the Consent Decree] allow for only one meaning: compliance with the load factor ceiling is required for all bus routes except those exempted under the provisions of II.A.3.

(Opp. App. at 10a.)[6] The Master requested that the JWG (see

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[6]*See also* Opp. App. at 34a (Order re Plaintiffs' Motion for Reconsideration of the Special Master's July 15, 1998 Order re Compliance Standards) ("Extrinsic evidence supporting an interpretation to which an agreement is not reasonably susceptible is not admissible. *Barris Indus., Inc. v. Worldvision Enters., Inc.*, 875 F.2d 1446 (9th Cir. 1989). The declarations of Dana Woodbury and Harold Hirsch, submitted by the MTA on July 8, 1998, constitute such inadmissible extrinsic evidence because they support

supra pp. 5-6) determine, pursuant to the compliance standards enunciated in his Order, whether the initial load factor target had been met by MTA (Opp. App. 18a). "On September 8 and 9, 1998, the JWG found that the MTA was not in compliance with the 1.35 LFT for 75 out of the 79 monitored MTA bus lines" (Pet. 58a).

When neither the JWG nor the parties, negotiating directly, were able to reach agreement on appropriate remedial steps to address the noncompliance, the parties submitted separate proposals and supporting briefs to the Special Master. Both parties agreed on the causes of approximately half of the instances of noncompliance demonstrated by monitoring (Pet. 62a-63a), and both agreed that MTA needed to purchase some number of additional buses (besides replacing unreliable vehicles in its fleet whose repeated breakdowns were a major factor in overcrowding) in order to comply with the load factor

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MTA's unreasonable interpretation that the Consent Decree requires compliance based on an averaging across all bus routes."); Pet. 145a (Special Master's decision on MTA's motion for clarification and modification of subsequent remedial order) ("Having reviewed the language of the Consent Decree, the MTA's arguments and my prior Orders, I continue to find that the standards enunciated in previous Orders are fully in keeping with the MTA's repeated admonitions that the meaning of a contract is to be gleaned from the language of the writing alone. *See also* Cal. Civ. Code § 1639.").

In an earlier decision, the Special Master had stated that "the Consent Decree must be 'construed with reference to ordinary contract principles of the state in which the decree is signed.' Gates v. Gomez, 60 F.3d 525, 530 (9th Cir. 1995) (citations omitted)." *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*, No. CV 94-6936 TJH (MCx), Memorandum Decision and Recommendations of the Special Master In Re Late Night and Owl Service Modifications, at 13 (C.D. Cal. Feb. 24, 1998).

targets in the Consent Decree.[7] Petitioners estimated the number of additional buses needed at 160 (*id.* at 72a); Respondents calculated that a much larger number, 553 new vehicles, would be necessary (*id.* at 74a). In a March 6, 1999 Memorandum Decision and Order (*id.* at 50a-122a), the Special Master conducted a painstaking analysis of the extent and causes of overcrowding on buses, concluding that in addition to replacing unreliable vehicles in its fleet, MTA needed, and was therefore directed, to purchase a total of 430 additional buses (Pet. 119a).

4. Challenge to the Special Master's Authority. Petitioners sought reconsideration of this March 6, 1999 Order by the Special Master. Not only did they ask the Special Master to recalculate and reduce the number of additional buses he had determined were necessary to meet the targets, but they also challenged the Master's authority to do anything except determine "(1) whether the [load factor] targets have been met, or (2) whether sufficient funds have been reprogrammed to meet the next target" (Pet. 136a) (quoting MTA motion). After careful consideration, the Special Master on May 14, 1999 granted reconsideration and reduced the number of new vehicles that MTA would be required to purchase to 379 (*id.* at 157a).

The Special Master rejected the challenge to his remedial authority, relying principally upon the language in § V of the Consent Decree providing that, in case of "any dispute arising under any provision of Sections I through IV of this Consent Decree" that could not be resolved by either the JWG or the parties' attorneys, "the attorneys *shall* refer the matter to

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[7]The parties' plans were designed to bring MTA into compliance not only with the first required reduction in overcrowding set by the Consent Decree, but also with the second (June 2000) target (see Pet. 175a), which was rapidly approaching.

the Special Master *for resolution*, pursuant to procedures set forth by the Special Master" (Pet. 137a [emphasis added]). The Master rejected Petitioners' argument that his authority was limited to the specific subjects mentioned in Section II.A.4. of the Decree,[8] again relying specifically on applicable canons of contract interpretation in California:

> The remedial powers described in Section II.A.4 are fully consistent with the Special Master's dispute resolution authority found in Section V. Well-established canons of contract interpretation, embodied in California law, provide that the "whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Reading these two sections together, and giving effect to each, it is clear that the Section II remedial powers authorizing the Special Master to determine whether MTA funds must be reprogrammed *supplements*, rather than excludes, the Special Master's Section V power to issue remedial orders resolving disputes under the Decree.

(Pet. 137a-138a [emphasis in original].) The Special Master also found that the District Court's Order of Reference (formally appointing him pursuant to Fed. R. Civ. P. 53 and the Consent Decree) reinforced his authority to issue remedial orders (*id.* at 138a) and, finally, that MTA itself had previously recognized and acted upon this authority:

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[8] "Any dispute concerning whether the targets have been met; or if the targets have not been met, whether sufficient funds have been reprogrammed to meet the next target will . . . [if not resolved by the JWG] be referred to the Special Master" (Pet. 177a [bracketed language added]).

> As the Plaintiffs have pointed out, the MTA's prior conduct in these proceedings reflects an explicit recognition of the Special Master's authority to resolve disputes and compel the parties to act when necessary. Most notably, in July 1998, the MTA filed a motion asking the Special Master to exercise his dispute resolution authority and prohibit the Plaintiffs from organizing a "no seat, no fare" strike. The MTA cited to the Special Master's powers under Section V.B. of the Consent Decree and concluded the following:
>
> > "Here, the Special Master was appointed to monitor the parties' compliance with, and resolve any disputes arising under, the Consent Decree. (Consent Decree, § V.) The Consent Decree does not impose any limitations on the Special Master's powers or authorities [*sic*] to effectuate these objectives. Accordingly, *the Special Master has the inherent authority to issue orders and resolve disputes* raising [*sic*] under the Consent Decree."

(Pet. 139a [emphasis added by Special Master].)

The Special Master also disagreed with MTA's contention that the Decree left formulation of a remedy for noncompliance up to the unreviewable discretion of the agency:

> MTA attempts to nullify the Special Master's agreed-upon authority by misreading Section II.A.3 of the Decree, which provides that the MTA initially has the discretion to determine how to meet the load factor requirements. The MTA contends that under this provision it is the sole arbiter of how to remedy its own violations.

> The MTA was fully afforded the initial discretion contemplated by Section II.A.3. From 1996 to the present, the MTA, in its sole discretion, decided what steps to take to comply with the Decree. Those steps, however, have been shown to be insufficient.

(Pet. 140a-141a [footnote omitted]). The Master also rejected MTA's argument that he was required to defer to MTA's views on the remedy for noncompliance (Pet. 141a-144a).

5. Review by the District Court and Court of Appeals. Petitioners sought review of the Special Master's Orders in the District Court,[9] which on September 23, 1999 reduced the number of buses that MTA would be required to purchase pending reconsideration by the Special Master, and otherwise affirmed the Master's rulings (Pet. 43a-48a).[10] The District Court held that the Special Master and the Court were vested under the Consent Decree with authority to issue remedial orders to Petitioners, as a matter of, first, clear statement in the Decree itself; second, judicial estoppel based upon MTA's prior request that the Master issue an injunction

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[9]Section V.B. of the Consent Decree provides that "Any matter resolved by or referred to the Special Master may be reviewed by the District Court, along with the recommendations of the Special Master, if any, upon motion by either of the parties" (Pet. 183a).

[10]The District Court specifically affirmed the Special Master's rejection of MTA's claim that it had sole authority to devise remedies for its own noncompliance with the Decree: "By the clear language of the consent decree, the MTA had the *initial* responsibility to devise and implement a plan to reduce bus overcrowding. Since the MTA failed to meet the obligations imposed by the consent decree, it is now up to the Special Master and the Court – through the Court's equitable powers – to enforce the consent decree." (Pet. 45a [emphasis in original].) The District Court amended its Order slightly on October 6, 1999 (Pet. 49a).

against the Bus Riders Union; and third, the inherent authority of a court of equity to enforce its injunctions (Pet. 44a-45a).

A divided panel of the Court of Appeals affirmed the judgment of the District Court (Pet. 1a-20a). The majority agreed with the Special Master's determination of the standard for measuring compliance with the load factor targets based upon the language of the Consent Decree (*id.* at 14a-15a) and rejected MTA's argument that the Master lacked power to resolve disputes under the Decree and issue remedial Orders in the event of noncompliance (*id.* at 17a-18a). Judge Hall did not dissent on these questions, writing that "MTA consented to the terms of the decree, including the Load Factor Targets ('LFTs') and the special master's role in resolving disputes" (*id.* at 22a, 34a).

The panel majority also found no error in the Special Master's factual finding that MTA "had failed to demonstrate that it lacked sufficient funds to otherwise meet its statutory obligations" if it complied with his bus-purchase Order (*id.* at 15a-16a) and concluded that the Master's and District Court's Orders did not unduly intrude into the management of MTA's affairs (*id.* at 18a-20a) "because (1) MTA consented to this dispute resolution, (2) MTA had the opportunity to comply with the Consent Decree but failed to do so, and (3) the remedial order does not require a violation of state or federal laws" (*id.* at 18a).

Judge Hall, dissenting in part, recognized that "because of MTA's failure to prepare a plan that addressed all of its LFT violations, the special master and district court could not fully defer to MTA's proposed plan" (*id.* at 23a, 35a). Nevertheless, she viewed the remedy ordered by the Special Master as too intrusive because it failed to allow "MTA enough time to secure [state and federally required] approvals" to use funds to purchase additional buses "nor made the remedy contingent

upon obtaining them," *id.* at 25a, 37a; *see id.* at 29a, 41a (same); *id.* at 27a, 39a ("Although there was evidence before the court to support the conclusion that MTA had not yet exhausted all possible sources of funding for new buses, that evidence also showed that MTA would have to . . . go through planning and approval processes, the very same types of funding programs with which the remedial order prevents MTA from complying").

REASONS FOR DENYING THE WRIT

I

Contrary To Petitioners' Assertions, The Special Master, District Court, And Court Of Appeals All Construed The Terms Of The Consent Decree By Applying Principles Of Contract Interpretation

Petitioners argue that the Special Master (*see* Pet. at 5 n.3), the District Court (*see id.* at 8), and the Court of Appeals (*see id.* at 10) all disregarded this Court's decisions in *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) and *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975) "by construing the Decree solely as a judgment rather than as a contract for enforcement purposes" (Pet. at i). But Petitioners cite no language from any of the opinions below supporting their assertion, as these examples from their discussion of the Court of Appeals' ruling illustrate:

> Despite petitioners' discussion of *ITT Continental Baking* and *Armour & Co.*, the majority held that the Decree should be construed only as a judgment (Pet. at 10 [no citation provided]).
>
> Although the MTA called *ITT Continental Baking Co.* and *Armour & Co.* to the Court of Appeals' attention,

> the panel failed to follow or even mention those cases (Pet. at 11 [no citation provided]).

The Court of Appeals did discuss the status of the Consent Decree as a judgment, but only in the section of the majority opinion setting out the Standard of Review (Pet. 13a), where it stated that

> A consent decree is enforceable as a judicial decree and "is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992).[11] This court reviews de novo the district court's interpretation of the consent decree, but must defer to the district court's factual findings underlying the interpretation unless they are clearly erroneous [citations omitted].

Id. This language is wholly unexceptionable, simply recognizing that remedies for violations of consent decrees are not limited to those available for violations of private contracts because consent decrees approved and issued by courts are injunctions. "Consent decrees and orders have attributes both of contracts and of judicial decrees .... Because of this dual character, consent decrees are treated as contracts for some purposes but not for others." *ITT Continental Baking*, 420 U.S. at 236 n.10 (citations omitted).[12]

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[11]Petitioners assert that "[t]he majority opinion cites *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992), to support its conclusion that the Decree should be interpreted *only* as a judgment" (Pet. at 11 [emphasis added]). That is a blatant misrepresentation of what the majority opinion — which does not include the word "only" — says.

[12]*See, e.g., Benjamin v. Jacobson*, 172 F.3d 144, 157 (2d Cir. 1999) (*en banc*) (distinguishing between private settlement

The Court of Appeals' agreement with the Special Master's and District Court's interpretation of the Consent Decree rested solidly on the most basic canon of construing contracts: the specific language of the writing. (Pet. 14a-15a.) Indeed, the Special Master explicitly referred to and relied upon principles of contract interpretation applied by the California courts in reaching his conclusions about the meaning of the Decree and the obligations it placed upon Petitioners. See discussion *supra* pp.7 & n.6, 9-11; see also Pet. 138a (citing *Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11 (1994)). The "issue" framed by Petitioners simply is not in this case.

Moreover, the approach taken by the Special Master and the courts below is fully consistent with the rulings in *Armour* and *ITT Continental Baking*. This Court emphasized in *Armour* that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it," 402 U.S. at 682, and in *ITT Continental Baking* that "the instrument must be construed as it is written, and not as it might have been written had [one of the parties] established his factual claims and legal theories in litigation," 410 U.S. at 236 [language in brackets added], quoting *Armour*.[13]

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agreements and consent decrees: "A plaintiff willing to settle constitutional claims by way of a consent decree seeks the assurance that, if the defendant fails to fulfill its agreed obligations, those obligations will be enforceable through the court's exercise of its contempt power. . . . The parties may of course enter into an agreement that is not conditioned upon such approval [by the court], but that would be a different agreement from an accord envisioning a consent decree").

[13]The various decisions of federal courts of appeals with which Petitioners suggest the ruling below is in conflict (Pet. at 16)

Finally, the "construction" of the Decree that Petitioners urge, measuring compliance with the load factor targets by calculating MTA system-wide "averages over 20-minute peak periods" (Pet. at 3) could not represent the contemporaneous "intent" of the parties when the Consent Decree was negotiated (*see id.* at 5 n.3) because it was suggested by Petitioners to the Special Master as a standard to be "newly proclaimed" by the Master in preference to the standard "existing in the Consent Decree," *see supra* pp. 6-7 (quoting Petitioners' letter brief to the Special Master, *infra* Opp. App. at 54a).

For all of these reasons, the first "Question Presented" by Petitioners does not arise on the record of this case, and there is no basis for issuing the Writ. Were the Court to grant review on this issue, it would inevitably find it necessary to dismiss the Writ as improvidently granted.

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do not hold otherwise. *E.g.*, *E.E.O.C. v. New York Times Co.*, 196 F.3d 72, 78 (2d Cir. 1999) ("Although courts have equitable powers to enforce consent decrees, such power exists only to ensure compliance with the decrees' terms. . . . the statistical goals in the instant case are specifically set out in the decree. By focusing on those goals, we are, therefore, enforcing the express agreement of the parties."); *Harris v. City of Philadelphia*, 137 F.3d 209, 212 (3d Cir. 1998) ("We discern the scope of a consent decree by examining the language within its four corners. . . . A court should not later modify the decree by interposing terms not agreed to by the parties or not included in the language of the decree."); *Musso v. University of Minnesota*, 105 F.3d 409, 411 (8th Cir. 1997) (applying *Armour* to reject argument that "special mechanism for dealing with sex discrimination claims" created by consent decree was available, by virtue of "relation back" theory applied by courts in discrimination cases, to alleged victim of retaliatory act that took place after "the bargained-for-date [stated in the decree] on which that mechanism lapsed").

II

The Second Question Presented By Petitioners Is Dependent Upon Assumptions That Are Contrary To Factual Findings Concurred In By Two Courts Below And Is Therefore Inappropriate For Review By This Court

Petitioners' heated rhetoric about the lower courts' alleged disregard of the principles of federalism in this case has no roots in the proceedings or decisions below. First of all, the Special Master and the reviewing courts gave appropriate deference to MTA's governmental status and financial panel situation. Second, the concern of the dissenting judge on the panel — that the Special Master's decisions inflexibly ignored the possibility that MTA might encounter delays in obtaining the necessary funding for bus purchases, or even funding denials because his rulings did not allow the time needed for various grant applications and approvals — overlooks the Special Master's explicit clarification of his directives, when requested by MTA, so as to provide that delays in obtaining new equipment that were beyond MTA's control "would not be considered a violation of the remedial plan" that he ordered into effect (Pet. 135a n.13).

Petitioners assert that the decisions below improperly "intrude into the discretionary authority committed to state agencies" by "ordering the MTA to buy hundreds of buses" (a) "that the Decree did not require" and (b) "that the MTA had insufficient funding to buy and to operate while simultaneously meeting its statutory obligations to users of its transportation systems other than bus riders" (Pet. at i). To the extent that the first proposition is intended to incorporate MTA's contention that there was no failure on its part to meet the load factor target in the Decree, properly construed (*see* Pet. at 13), it

merges with the first Question Presented and has been dealt with above. Petitioners' remaining point about what the Decree required appears to be that the courts below should have deferred to MTA's own calculations of how many additional buses would be necessary to assure compliance with the Consent Decree as construed by the Special Master. (*See* Pet. at 6 ("The MTA produced substantial evidence . . . that it would meet the next [load factor reduction] target by implementing its L[oad]F[actor]R[emediation]P[lan]").)

However, the fundamental design flaws of MTA's plan made a substantial measure of deference inappropriate, as even the dissenting judge below recognized:

> [U]nlike MTA, federal courts are not in the business of running and funding local transportation systems. . . . For this reason, a substantial measure of deference to the local agency generally is appropriate. . . . Unfortunately, in the instant dispute, MTA put forward a remedial plan that was based on data covering only 20 of the 79 bus lines at issue. Because of MTA's failure to prepare a plan that addressed all of its LFT violations, the special master and district court could not fully defer to MTA's proposed plan.

(Pet. 23a, 35a.)[14] The Special Master performed his own detailed analysis of the data submitted by the parties (*see id.* at 76a-121a, 160a-169a) and, in the words of the majority

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[14]The Special Master found that Respondents' remedial plan "provide[d] a more comprehensive picture from which to determine line-by-line causes of load factor violations and serve[d] as a basis for tailoring appropriate remedies to the problem of overcrowding" because it was based on load factor violation "data for all 77 [bus] lines" "during the entire period from November 1997 through September 1998" (Pet. 76a, 77a).

opinion, "attempted to steer a middle course between the competing remedial plans" (Pet. 9a) in determining how many additional buses were necessary to comply with the Decree.[15] Except for directing reconsideration of some portions of the Special Master's remedial orders, the District Court affirmed the Master's factual findings on this subject (*id.* at 47a) and they were not disturbed by the Court of Appeals.

The second of Petitioners' points, that the rulings below were improperly intrusive because they failed to recognize MTA's limited funding and its need to meet its other statutory obligations, is equally lacking in merit.

Petitioners requested reconsideration and modification of the Special Master's remedial order on the basis of the same contentions. The Special Master concluded that MTA's protestations were unsupported and excessive:

> [T]he MTA does not demonstrate specifically how the March 6 Order would compel the MTA to violate any statutory obligations. In the MTA's May 4, 1998 draft Restructuring Plan, the MTA identifies the many funding sources for which bus capital and/or operating costs are eligible. [citation omitted.] For many of these bus-eligible funding categories, no funds at all have been allocated to buses. *See generally* Declaration of Thomas A. Rubin . . . (noting that the MTA has not applied for, allocated or obtained maximum bus

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[15]Although Petitioners argue that "The Decree never required the MTA to buy a bus whenever a target was missed" (Pet. at 4) and that "Nothing in the Decree required the MTA to buy buses if targets were missed; targets could also be met by vehicles other than buses, such as vans or taxis" (Pet. at 5), MTA's own remedial plan "concluded that 160 additional buses would be required to ensure compliance with the Decree" (Pet. 72a).

funding under various federal, state and local funding sources including Sections 5307, 5309 and Proposition C Funds). Thus, the fact that the MTA apparently has not applied for, allocated or received these bus-eligible funds somewhat undercuts the MTA's argument that it will be forced to tap already-committed funds, and therefore violate its other statutory obligations, to comply with the Decree. [footnote omitted.]

. . .

Moreover, . . . the MTA does not specifically show how its long-range budget, with careful and advance planning, cannot accommodate the expenditures required to comply with the March 6 Decision as modified by this Order. On the contrary, the November 11, 1998 Regional Transportation Alternatives Analysis ("RTAA") concluded that as a result of suspended rail projects and expanded funding sources, the MTA is expected to have approximately $1.4 billion in funds available between FY99 and FY04. While there are, of course, other important projects that call for the use of these funds, the fact remains that, on this record, the MTA has not shown why some of these funds could not be used to fund or to secure the funding of the expansion buses required by the Remedial Plan [footnote omitted.][16]

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[16]As the Special Master observed,

> Focusing on its other obligations . . . does not relieve the MTA from its obligation under the Decree to make bus operations its *first* priority:
>
> > "consistent with other statutory responsibilities and obligations, MTA's first priority for the use of bus-eligible funds realized in excess of funds already budgeted [in October, 1996] for other purposes

(Pet. 147a-149a.) These findings were not disturbed by the District Court, and the Court of Appeals specifically held not only that they were subject to the "clearly erroneous" standard of review, but also that "MTA has not pointed to any evidence suggesting that the Special Master's factual finding that MTA had not exhausted all sources of funding was clearly erroneous" (Pet. 16a-17a).

Thus, the factual foundations of both prongs of the "federalism" arguments advanced by Petitioners are conclusively undermined by the explicit findings of the Special Master and both reviewing courts below. Under these circumstances, this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error," *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *quoted in Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996), a showing not made by Petitioners here.

> shall be to improve bus service for the transit-dependent by implementing MTA's obligations pursuant to this Consent Decree."
>
> Consent Decree § I.F. [footnote omitted.] As a practical and contractual matter, the allocation of sufficient resources to halt the deterioration of bus service to the MTA's most frequent daily customers – the transit-dependent of Los Angeles – should take precedence over the funding of new transit alternatives, even those designed to attract new transit patrons. This is what the Consent Decree requires.

(Pet. 148a [emphasis in original] [bracketed language added].) The Master expressly ruled: "I do find that the MTA has not allocated, through reprogramming or otherwise, sufficient funds to procure and operate an adequate number of expansion buses to remedy the load factor violations attributable to insufficient capacity" (Pet. 126a n.2). *Compare* Consent Decree § II.A.4. (Pet. 177a).

Nevertheless, Petitioners argue that the Special Master's Order required MTA to seek state and federal funding to buy buses without "meeting the statutory conditions precedent with which it had to comply" and "imperiled the MTA's existing and future funding" (Pet. at 8-9 [footnote omitted]); *see also id.* at 10 (referring to "MTA's impending loss of State and federal funding caused by the district court's mandatory injunction").) Judge Hall, dissenting below, also expressed concern that the "district court and special master neither gave MTA enough time to secure these [precedent funding] approvals nor made the remedy contingent upon obtaining them" (*id.* at 25a, 37a).

Whatever force these considerations might otherwise have is vitiated by the following facts: *First*, in response to MTA's request for reconsideration and modification of the March 6 Order, the Special Master explicitly indicated that his Order was not intended to supersede compliance with statutory or programmatic requirements of funding programs, even if that caused delay in placing buses into service:

> The Special Master recognizes that severe time constraints face the MTA. While the MTA has in place a sound program that will address the "missing bus" cause of the load factor violations, it has not moved expeditiously to remedy, through fleet expansion, the "insufficient capacity" violations. In trying to catch up at this late stage, the MTA undoubtedly will need to satisfy various legal prerequisites and may confront unanticipated obstacles. These problems will have to be addressed if and when they present themselves. In the meantime, progress should be detailed in the quarterly reports.
>
> Again, perfection is not required and the MTA is not being asked to perform the impossible. If the MTA has a sufficient and court-approved remedial plan

> in place, and can establish that it is taking every reasonable step in its power to execute faithfully this plan, then, for example, the late arrival of additional new buses for reasons beyond the MTA's control *would not be considered a violation of the remedial plan.* To date, however, the MTA appears to resist any requirement of additional new expansion buses as part of a remedial plan that it has not, in its sole discretion, devised.

(Pet. 135a [footnote placed in text to avoid confusion] [emphasis added].)

Second, as MTA informed the Court of Appeals in its reply brief, it promptly complied with the District Court's ruling (while seeking a stay of its Order) by purchasing 297 additional buses:

> In response to the district court's September 23, 1999 order, the MTA Board of Directors voted on September 29, 1999, to procure 297 new buses and directed the MTA staff to commence the procurement process immediately.... Those buses represent the full amount of new buses that the MTA was directed to purchase by Mr. Bliss's memoranda, as modified by the district court's September 23, 1999 order.

(Appellant Los Angeles County Metropolitan Transportation Authority's Reply Brief at 12, *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*, 263 F.3d 1041 (9th Cir. 2001) (No. 99-56581) (Pet. 1a-30a).) Although the Ninth Circuit granted a stay pending appeal, this bus purchase order was not withdrawn. Yet none of the dire consequences which Petitioners continue to predict has occurred: MTA has not lost state or federal funding, nor been sanctioned for failing to comply with applicable procedures for seeking funding. Petitioners have not returned

to the District Court to seek relief from any practical problems flowing from their compliance with its Order. In short, Petitioners' actual experience in complying with the orders below demonstrates that the problems they conjure up are imaginary, not real. They certainly do not warrant this Court's review.

CONCLUSION

Because the Special Master and the lower courts interpreted the Consent Decree in this case pursuant to California law and canons of contract construction, the first Question Presented by Petitioners does not arise on this record and therefore provides no ground upon which the judgment below should be reviewed.

The second Question Presented by Petitioners is equally inappropriate for review by this Court, because it assumes facts contrary to the findings of the Special Master that were accepted as not clearly erroneous by both courts below.

For the foregoing reasons, Respondents respectfully submit that the Writ should be denied.

Respectfully submitted,

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APPENDIX

June 29, 1998 Procedural Order of the Special Master

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PROCEEDING BEFORE SPECIAL MASTER DONALD T. BLISS

LABOR/COMMUNITY STRATEGY CENTER, et al.,	)	Case No. CV 94-5936 TJH (MCx)
Plaintiffs,	)	**IN RE LOAD FACTOR COMPLIANCE**
vs.	)	
LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY and JULIAN BURKE,	)	
Defendants.	)	

PROCEDURAL ORDER

On June 24, 1998, a pre-hearing status conference on the issue of load factor compliance was held in Los Angeles between the Special Master and counsel for the parties. After hearing the arguments made at the conference, and after reviewing the joint preliminary report submitted by the parties, I have decided to implement the following procedures in an attempt to streamline the process in this consolidated Sta[g]e I and Stage 11 proceeding.

June 29, 1998 Procedural Order of the Special Master

First, the parties shall submit simultaneous briefing on the following foundation legal issue:

> Under the decree, what is the concrete standard by which the Special Master is to measure compliance with the target load factor requirements?

In briefing this question, it is suggested that the parties cover the following four sub-issues:

> (1) Should compliance with the load factor requirement be measured on a system-wide basis, on a line-by-line basis, or by some other criteria?
>
> (2) In determining whether load factor compliance has been reached, does the decree require that the data to be measured include data on by-passed passengers?
>
> (3) Under the decree, what is the proper method of computing the "20 minute weekday peak period" specified under § II.A.2?
>
> (4) Does the decree permit taking any mitigating factors into account in determining whether MTA is in compliance with the load factor targets? Does the decree permit the load factor targets to be exceeded under any circumstances? If so, how should mitigating factors or target exceedence be defined and quantified for the purpose of determining compliance with the decree?

The parties are also invited to brief other legal issues relevant to the foundation legal issue set forth above, including the issue of the "102 additional buses" requirement to the extent relevant. Specific issues relating to the status of the Pilot Project will not

be addressed in this proceeding. Opening briefs shall be faxed to the Special Master and to opposing parties no later than July 8, 1998. Optional reply briefs shall be faxed no later than July 9. There will be no extensions.

Second, once a decision is reached by the Special Master (scheduled for July 15) the Joint Working Group shall meet to determine whether or not the MTA, under the appropriate standard, has achieved compliance under the decree. This determination by the JWG shall be made no later than 5:00 p.m. EDT (2:00 PDT) July 21, 1998. If the JWG cannot reach agreement on this issue, the question of compliance shall be referred back to the Special Master. If the JWG finds that the MTA is in compliance with Section II.A of the decree, this proceeding will be terminated. If the JWG finds that the MTA has not achieved compliance under the decree, it shall continue to meet to make recommendations as to the precise degree of noncompliance and the specific remedies required to achieve compliance. The JWG shall report its specific determinations and recommendations on these issues directly to the Special Master on or before a date to be established by the Special Master after further consultation with the JWG. After the JWG submits its final report on remedies, counsel to the parties will be provided an opportunity to submit a brief to the Special Master discussing the report of the JWG. The Special Master will review the report of the JWG and the briefs submitted by counsel in deciding whether to approve the report and specific recommendations of the JWG.

Third, a conference call to discuss the findings of the JWG shall be scheduled for 8:00 p.m. EDT (5:00 p.m. PDT) on July 21, 1998. The Co-Chair of the JWG or their representatives shall be available for this conference call. The

purpose of this conference call will be to receive a report on the findings of the JWG concerning compliance or noncompliance with the load factor requirements. If the JWG reaches impasse and cannot agree on a finding, the parties will discuss follow-up requirements in accordance with the following schedule.

Fourth, if the JWG reaches impasse on the issue of compliance with the decree, the parties shall have an opportunity to conduct discovery on the question of compliance as well as the remedies to be fashioned in the case of non-compliance. Discovery shall commence on July 24, 1998 and shall close on August 11, 1998.

Fifth, the parties shall fully brief the issues raised in this consolidated Stage I and Stage II proceeding after the close of the discovery period. The plaintiffs' opening brief shall be faxed no later than August 18, 1998. The defendants' opposition brief shall be faxed on September 1, 1998; the plaintiffs' optional reply shall be faxed on September 4, 1998.

Sixth, if on July 21 the JWG is granted additional time to meet and consider the degree of noncompliance and the specific remedies required, and thereafter reaches an impasse on these issues, the Special Master will establish a new schedule for discovery and briefing of these issues.

Dated: 6/29/98

/s/ Donald T. Bliss
Donald T. Bliss
SPECIAL MASTER

June 29, 1998 Procedural Order of the Special Master

PROOF OF SERVICE

The foregoing document described as PROCEDURAL ORDER, IN RE LOAD FACTOR COMPLIANCE has been served on June 29, 1998, via the United States Postal Service by first-class, pre-paid mail in sealed envelopes to the following parties:

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June 29, 1998 Procedural Order of the Special Master

Copies of the foregoing have been provided by facsimile to Mr. Kenneth Klein/Mr. David Kelsey/Gabriela Mejia and Ms. Constance Rice/Mr. Richard Larson.

/s/ Donald T. Bliss
Special Master

July 15, 1998 Memorandum Decision and Order of Special Master Re Standards for Compliance

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PROCEEDING BEFORE SPECIAL MASTER DONALD T. BLISS

LABOR/COMMUNITY STRATEGY CENTER, et al.,	Case No. CV 94-5936 TJH (MCx)
Plaintiffs,	**IN RE LOAD FACTOR COMPLIANCE**
vs.	
LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY and JULIAN BURKE,	**ORDER RE STANDARDS FOR COMPLIANCE**
Defendants.	

MEMORANDUM DECISION AND ORDER

On June 24, 1998, the parties agreed to brief simultaneously the foundational legal issue of the appropriate standard by which the Special Master is to measure and determine compliance with the target load factor requirements set forth in Section II.A.1. of the Consent Decree. *(See* Procedural Order, dated June 29, 1998.) Having reviewed the plaintiffs' and defendants' briefs, in conjunction with the record

in this proceeding, I make the following legal and factual findings:

I. SUMMARY OF FINDINGS

A. Section II.A.1. of the Consent Decree requires MTA to meet the December 31, 1997 load factor reduction target for all nonexempt bus routes, measured on a line-by-line basis.

B. For the purpose of determining compliance with the Consent Decree, the Joint Working Group (JWG) should utilize the fixed 20-minute periods established by MTA procedures.

C. The Consent Decree does not require MTA to incorporate by-passed passenger data into its compliance calculations.

D. Section II.B. of the Consent Decree envisions that MTA eventually will procure 102 buses in addition to the buses purchased for replacement purposes.

These findings are explained in more detail in the following section.

II. LEGAL ANALYSIS

A. The Consent Decree Requires Compliance For All Nonexempt Bus Routes, Measured On A Line-By-Line Basis.

The operative provision of the Consent Decree which governs the standard for compliance states, in relevant part:

> "MTA shall establish as a five-year goal to be reached by the end of the fifth complete fiscal year following the approval of this Consent Decree, the reduction of the maximum load factor ceiling for all bus routes from 1.45 to 1.2 in the following increments ("target load factors"):
>
> "December 31, 1997, 1.35 . . . ."

(Section II.A-1. (emphasis added).) This terminology -- requiring reduction of load factor ceilings for "all bus routes" -- is consistently used throughout Section II of the Consent Decree. For example, Section II.A.4. states:

> "If MTA fails to meet the target load factors for all bus lines by the dates specified in paragraph 1 above . . . MTA shall meet the target as soon as possible . . . ."

(emphasis added).

This framework is further supported by the language and purpose of Section II.A.2., which defines "Peak load factor" as the total number of passengers divided by the total number of seats "during any 20 minute weekday peak period in the peak direction of travel on each bus line." (emphasis added). Since the measure -- "peak load factor" -- is defined by reference to "each" individual bus line, and since Section II.A.2 requires compliance for "all bus routes," the ordinary meaning of these terms, taken together, requires compliance for each and every bus line. There is no language in the Consent Decree which provides for the possibility of averaging across multiple lines.

Section II.A.3. provides two specific ways of exempting specific bus lines from the load factor reduction requirements. First, if ridership increases by more than 15 percent on any bus line, MTA may defer the target on that line for one year. Second, the Consent Decree provides that "the JWG [Joint Working Group] will designate a list of bus lines which may be exempted from the load factor reduction requirement, such as lines with low frequency service." Apparently, MTA has not invoked the first exception, and the JWG has not specifically designated a list of bus lines to be exempted.[1]

Reading these sections together, I have concluded that MTA is obligated by Section II.A.1. of the Consent Decree to meet the December 31, 1997 target load factor of 1.35 on all nonexempt bus routes, measured on a line-by-line basis.

In the absence of ambiguity, a court will interpret a contract or statute according to the clear, explicit meaning of the words used. *See e.g., Avemco Ins. Co. v. Davenport,* 140 F.3d 839, 842 (9th Cir. 1998); *Perrin v. United States,* 444 U.S. 37, 42 (1979). The preceding provisions allow for only one common meaning: compliance with the load factor ceiling is

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[1]Although the JWG has not specifically listed exempt lines, it was noted at the status conference on June 24, 1998 that there are a number of lines for which sufficient and timely monitoring data i.e., point checks) had not been obtained in order to concentrate monitoring resources on the 77 most traveled lines. This approach, which was discussed by counsel to both parties and the Special Master at a previous informal conference, essentially means that the data are available for measuring compliance on approximately 77 lines.

required for all bus routes except those exempted under the provisions of II.A.3.

The MTA suggests that the standard for compliance should be a measurement of MTA's overall compliance rate, per time period, against the industry-wide percentage of service interruptions. In effect, MTA argues for a percentage "cushion" equal to the industry-wide rate of interruptions for each time period. While MTA presents a thoughtful and analytical case for the complexities and difficulties of achieving the target load factors, which apparently were not fully understood by MTA at the time it entered into the Consent Decree, there are several problems with the approach it now suggests. First, there is no support for this standard in the language of the Consent Decree itself, which clearly refers to"all bus routes" and "all bus lines" and measures performance on "each bus line." Second, MTA's proposal assumes that a service interruption on a particular line will automatically cause the load factor to be exceeded for that line. Although it may be that an exceedence of the ceiling is more likely under such circumstances, as an empirical matter MTA has not -- and probably cannot -- establish that every service interruption leads inevitably to exceeding the target. Finally, even if these factors were co-extensive, the Consent Decree does not excuse a failure to meet the load factor ceiling merely because of service interruptions. Equipment malfunctions, traffic, weather and other variables are contingencies which were known at the time of the execution

of the Consent Decree and therefore must be taken into consideration in planning for compliance with the load factor ceilings.[2]

MTA does not dispute "that the target load factor requirements are applicable to all of its bus routes." (MTA Reply at 1.) However, MTA does dispute "the contention that if the load factor target of 1.35 is not achieved in any single 20-minute time period, then the MTA is in breach of the Consent Decree." (*Id.*) MTA contends that while the Consent Decree describes how to compute the peak load factor, it does not explicitly state that failure to obtain the 1.35 load factor ceiling in any 20-minute period constitutes a breach. Consequently, MTA contends that the Special Master has some discretion to determine what is reasonable compliance, in order to avoid a harsh and unreasonable result.

While MTA's contentions and concerns are not without merit, it should be noted that the Consent Decree does build-in some flexibility for MTA in meeting the load factor targets:

- The 20 minute period (for peak periods) and one-hour period (for nonpeak periods) is an average of all buses travelling on a bus route

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[2]MTA cannot be heard to argue that to comply with these requirements it will have to achieve a load factor well below the 1.35 initial target. While this may be the case for some bus lines, the load factor targets are ceilings and MTA is required to take all feasible steps to ensure that they are not exceeded. In any event, since the MTA is required to meet even stricter targets in the future, such steps will be necessary to meet these later requirements.

during the specified time period. Thus, individual buses may exceed the load factor without exceeding the target if the average of all buses on that particular route in the period meets the target.

- MTA may defer the target for a year for any line on which the ridership increases by more than 15 percent.
- The JWG is directed to designate a list of exempted buses.
- The Consent Decree expressly reserves to MTA "the discretion in determining how the targets will be met." (Section II.A.3.)

In addition, plaintiffs acknowledge that there are circumstances where MTA would be excused from compliance with the performance standard in Section II.A.1. and that enforcement action would not be appropriate for *de minimis* noncompliance. *(See* Plaintiffs' Opening Brief at 15, n. 11.)

I agree that the language of the Consent Decree affords the Special Master some discretion in fashioning a remedy where the failure to meet the target load factor is *de minimis.* This is consistent with the well-established principle that courts have discretion to deny a remedy where the noncompliance is *de minimis. See Withrow v. Concannon,* 942 F.2d 1385, 1388 (9th Cir. 1991)(district courts have discretion to deny injunctive relief where noncompliance is *de minimis); see also Thomas v. Peterson,* 753 F.2d 754 (9th Cir. 1985). Accordingly, the JWG is directed to develop and apply an appropriate *de minimis* standard which should reflect the understanding that certain bus

lines, which may not exhibit consistent indicia of overcrowding, may nevertheless fail to meet the load factor target on a few, isolated occasions. A *de minimis* standard is intended to obviate an immediate remedial plan for specific bus lines where the periods in which the load factors are exceeded are infrequent, likely attributable to unique and nonrecurring circumstances or events, and not reflective of a continuing condition of overcrowding. Bus lines which meet these *de minimis* criteria, while technically falling short of the target load factor, will not require immediate remedial or enforcement action.[3]

If the JWG cannot agree on a *de minimis* standard, then each Co-Chair of the JWG shall recommend an appropriate *de minimis* standard and shall submit separately a list of bus lines that qualify for *de minimis* treatment.

In sum, a determination as to whether MTA is in compliance with the target load factor requirement of Section II.A.1. of the Consent Decree should be made on a line-by-line basis. Where there is sufficient and timely monitoring data which show that the target has been exceeded on a specific line, other than on an exempt line, then the MTA is not in compliance with respect to that line. If MTA fails to meet the 1.35 load factor requirement on specific lines, then (except for *de minimis* noncompliance) a remedy must be fashioned that

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[3] Bus lines which meet these criteria shall be placed on a "watch list" and monitored closely thereafter. If they exceed the target load factors in excess of the *de minimis* standard they will be designated for remedial action.

would enable MTA to achieve and maintain compliance with respect to that line and to meet future targets.

In its briefs and accompanying Declarations, MTA has raised a number of important concerns and issues. MTA has shown the difficulty of meeting the load factor targets during peak periods where there are service disruptions. MTA has further described the specific problems that have occurred with the fleet of 200 ethanol and 500 CNG buses and the steps that are being taken to remedy these problems and add more reliable capacity to the fleet. Finally, MTA has indicated that significant progress has been made in achieving the load factor targets during the first two quarters of this year.

If, after applying the standards set forth in this Order, it is determined that MTA has not met the December 31, 1997 load factor targets and has not subsequently come into compliance with the targets with respect to specific bus routes, then the analysis and concerns set forth by MTA will be given careful and thorough consideration in designing a remedy that is practical, feasible, and reasonable.

B. The Load Factor Shall Be Calculated Using The 20-minute Fixed Peak Periods Already Utilized By The MTA.

The parties dispute whether the 20-minute peak period should be calculated using a "sliding window" approach or the fixed 20-minute periods utilized by the MTA. Section II.A.2. provides that "MTA shall conduct ride checks to determine load factors using current MTA procedures and schedules." During an informal conference with the Special Master, it was decided to apply most of the limited resources available to the collection of point check data. *(See* Plaintiffs' Opening Brief at

3, n.2.) MTA states -- and the plaintiffs apparently do not dispute -- that its "procedures and schedules in existence at the time of the negotiation of the Consent Decree[,] and for at least ten years prior to the Consent Decree[,] used fixed 20-minute intervals." (MTA Opening Brief at 11 (citation omitted).) Since MTA was obligated to meet the target load factors, it was important to MTA to know the basis upon which the data would be collected and used in determining compliance. On the other hand, it was important to plaintiffs that MTA supply the JWG with all such data and that the JWG be informed of "any change in data gathering/processing procedures." (Section II.A.2. (emphasis added).) The use of the term "any 20 minute weekday period" does not implicitly incorporate the concept of a "sliding" or "rolling" 20-minute period, but rather refers to the determination of the peak load factor by computing the highest ratio of any of the 20-minute periods for which the data were collected pursuant to the MTA collection procedures at the time.

Thus, for the purpose of determining compliance with the load factor targets on a line-by-line basis, it is appropriate to refer to the 20-minute periods established by MTA procedures. This does not mean, however, that computations based on a sliding 20-minute period would be inadmissible or that such data would not be useful in addressing other issues in this proceeding.

C. The Consent Decree Does Not Require The MTA To Include Data On ByPassed Passengers.

The parties have raised the question of whether or not the MTA is required under the Consent Decree to incorporate

data on by-passed passengers in calculating its load factors. The Consent Decree does not contain any provision which explicitly requires the MTA to incorporate by-passed passenger data into its compliance calculations.

Section II.A.2. provides that "[t]arget load factors shall not be achieved by-passing passengers at bus stops." This provision prohibits MTA from intentionally by-passing passengers as a means of achieving compliance with the load factor targets. If plaintiffs make a showing, either through data or other extrinsic evidence, that the MTA is engaging in such practices, at that point the Special Master will consider what remedies or sanctions are appropriate. In the absence of such evidence, however, the MTA will not be required to incorporate such data into its compliance calculations. Collecting and using accurate by-pass data is a complex process. A passenger standing at a bus stop may not board a specific bus because he or she is waiting for another bus line that shares the same stop or because the passenger prefers to take a less crowded bus that follows closely behind or because the person is waiting to greet a disembarking passenger. Given the inherent problems with by-passed passenger data, it would not be fair to include such data in the compliance calculations except where there is evidence that operators are intentionally by-passing passengers in order to meet the load factor targets.

D. The MTA Is Required Under The Consent Decree Eventually To Purchase 102 Additional Buses.

In the Preliminary Views of the Special Master Based on Informal Briefing (March 12, 1997), the Special Master expressed preliminary views about the requirement in Section

II.B. concerning 102 additional buses. At that time, it was apparent that MTA could not satisfy this requirement by procuring 102 additional new buses within the short deadlines provided by the Consent Decree. Thus, the practical solution was to add to overcrowded routes serving the transit-dependent new buses that were already on order as replacement buses and to extend for a reasonable period of time the life of the buses that were scheduled for phase-out.

To comply fully with the express terms of Section II.B., however, it was always envisioned that the MTA eventually would procure the additional buses agreed upon in the Consent Decree since both parties recognized that the buses scheduled for replacement were near the end of their life cycle. No time was set for the procurement of an additional 102 buses that would enable MTA to phase out the buses originally scheduled for replacement while maintaining the net addition of 102 buses in the fleet. If it is determined that MTA has not met the target load factor on certain lines, it would be appropriate to consider whether the time is now ripe for the procurement of the net addition of 102 new buses, if MTA has not done so already.

WHEREFORE, it is hereby Ordered that:

1. A copy of this Memorandum Decision and Order shall be provided to the Co-Chair of the Joint Working Group ("JWG") who shall convene a meeting of the JWG to determine whether MTA has met the load factor targets set forth in Section II.A.1. of the Consent Decree.

2. The Co-Chair of the JWG shall report to the Special Master on the form attached as Exhibit A hereto on or before 2:00 p.m. PDT on July 21, 1998.

3. A conference call is scheduled for 5:00 p.m. PDT on July 21, 1998 to set a schedule for subsequent action based on the report of the JWG.

/s/ Donald T. Bliss
Donald T. Bliss
SPECIAL MASTER

Dated: 7/15/98

July 15, 1998 Memorandum Decision and Order of Special Master Re Standards for Compliance

EXHIBIT A

The Joint Working Group met on _____, 1998 from _____ to _____ . The members of the JWG have reviewed the Memorandum Decision and Order of the Special Master, dated July 15, 1998. Based on the review and advice of the JWG, as Co-Chair of the JWG, we have made the following findings, as evidenced by our initials below.

_____ We have determined that MTA has met the load factor reduction target of 1.35 set forth in Section II.A.1. of the Consent Decree.

_____ We have determined that MTA has not met the load factor reduction target of 1.35 set forth in Section II.A. of the Consent Decree with respect to certain bus lines.

_____ We cannot agree as to whether MTA has met the load factor reduction target of 1.35. We therefore have reached impasse.

_____ MTA has not met the load factor targets on the following nonexempt bus lines (bus lines which did not meet the load factor targets but met the *de minimis* standard are to be included but may be identified separately): _____

_____

_____

_____

_____

_____.

_____ In determining that the target exceedence for certain bus lines is *de minimis* for purposes of remedy, we have adopted the following *de minimis* standard: _____
_____
_____.

_____ We did not agree on a *de minimis* standard. We have attached hereto *de minimis* standards recommended by each of the Co-Chairs and a list of bus lines that would qualify as *de minimis* under each respective standard.

_____ _____
Co-Chair Co-Chair
for _____ for _____

_____DATE/TIME

PROOF OF SERVICE

The foregoing MEMORANDUM DECISION AND ORDER IN RE: LOAD FACTOR COMPLIANCE/ORDER RE STANDARDS FOR COMPLIANCE has been served on July 15, 1998, via the United States Postal Service by first-class, pre-paid mail in sealed envelopes to the following parties:

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Copies of the foregoing have been provided by facsimile to Mr. Kenneth Klein/Gabriela Mejia, Mr. David Kelsey/Ms. Nina Webster, and Ms. Constance Rice/Mr. Richard Larson.

/s/ Donald T. Bliss
Special Master

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PROCEEDING BEFORE SPECIAL MASTER DONALD T. BLISS

LABOR/COMMUNITY STRATEGY CENTER, et al.,	)	Case No. CV 94-5936 TJH (MCx)
Plaintiffs,	)	**IN RE LOAD FACTOR COMPLIANCE**
vs.	)	
LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY and JULIAN BURKE,	)	
Defendants.	)	

ORDER RE PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE SPECIAL MASTER'S JULY 15, 1998 ORDER RE COMPLIANCE STANDARDS

BACKGROUND

Under Section II.A.1. of the Consent Decree, the MTA was required, by December 31, 1997, to reduce the maximum

load factor ceiling for all bus routes to 1.35. Some four months later, on May 1, 1998, counsel for plaintiffs' class filed a procedural motion before the Special Master seeking to consolidate Stage I and Stage II proceedings and to open a period of discovery to determine whether MTA has complied with the terms of the Consent Decree. MTA opposed the motion, seeking instead informal consultations in accordance with the procedures set forth in the Consent Decree. Because plaintiffs argued that informal discussions would be unproductive and because of the need to expedite resolution of the compliance issue, the Special Master granted the motion to consolidate on May 28, 1998 and requested the parties to clarify in writing the outstanding issues to be resolved. A status conference with the parties was held on June 24, 1998 for the purpose of narrowing the issues and setting an expedited briefing schedule.

In their submissions to the Special Master and at the June 24 status conference, the parties disputed the legal and factual standard under which MTA's compliance with the Decree is to be measured. It was determined that if this threshold legal issue was resolved first and the legal standard clarified, the Joint Working Group (JWG) established by the Consent Decree would be directed to determine whether MTA was in compliance with the December 31, 1997 load factor target. Accordingly, on June 29, 1998, the Special Master issued a Procedural Order directing the parties to submit, by July 8, 1998, simultaneous legal briefs addressing the foundational legal question (and various related sub-issues) concerning the proper standard by which to measure compliance under the Consent Decree.

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

The briefings submitted by the parties presented vastly different interpretations of the compliance standards under the Decree. The MTA contended that the standard for compliance should be a measurement of MTA's overall system-wide compliance rate, per time period, against the industry-wide percentage of service interruptions. The MTA also argued for a computation of the load factor using the fixed, 20-minute periods that MTA has consistently used in collecting data, and contended that the MTA was not required under the Decree to keep data on by-passed passengers. Conversely, the plaintiffs' class argued that the plain meaning of the Decree requires compliance to be measured for "all bus routes" using a sliding window for "any 20-minute period." Plaintiffs also argued that the MTA was required to keep data on by-passed passengers to ensure that it was not achieving the targets through these means.

After receiving the parties' opening and reply briefs, the Special Master issued a Memorandum Decision and Order on July 15, 1998 (the "July 15 Order"). The July 15 Order rejected MTA's "system-wide" averaging approach to compliance and stated that Section II.A.1. of the Consent Decree requires MTA to meet the December 31, 1997 load factor reduction target for all nonexempt bus routes, measured on a line-by-line basis. The Special Master also ruled that compliance is to be measured using the fixed, 20-minute periods consistently used by the MTA at the time the Consent Decree was negotiated and for at least ten years prior thereto, noting that the sliding 20-minute period could be "useful in addressing other issues in this proceeding." The Special Master further ruled that the MTA was prohibited under the Decree from intentionally by-passing

passengers to achieve compliance, although it was not required to gather these data in its load factor computations. The July 15 Order directed the JWG to convene and, applying this standard, determine whether MTA has met the load factor reduction target of 1.35 set forth in Section II.A.1 of the Consent Decree and, if the target has not been met, to specify the specific bus lines that did not meet the target. Since a single 20-minute violation would cause a bus line (and MTA) to be in violation of the Consent Decree, even if the violation occurred because of an extraordinary event on an otherwise uncrowded line, the JWG, which includes the technical expertise on bus operations as well as compliance monitoring, was instructed to consider, after listing any noncompliant lines, what type of *de minimis* standard could be applied during the remedy phase of this proceeding to eliminate the immediate need to remedy extraordinary situations not reflecting other indicia of overcrowding. Contrary to the plaintiffs' contention (Pls. Recon. Br., p. 4), however, there was to be no *de minimis* exception from the finding of noncompliance. The JWG was directed to report its findings on compliance in accordance with this standard on or before 2:00 p.m. PDT on July 21, 1998.

Shortly after the July 15 decision, counsel for the plaintiffs indicated their intention to move for reconsideration of the July 15, 1998 Order, and requested that the meeting of the JWG be postponed until after reconsideration. In a July 24th letter, plaintiffs submitted an agreed-upon briefing schedule. On August 14, 1998, plaintiffs filed their reconsideration brief. Plaintiffs did not dispute the fundamental ruling in the July 15, 1998 Order that Section II.A. of the Consent Decree requires MTA to reduce "the maximum load

factor ceiling" to 1.35 on all "bus lines" and that there is no language in the Consent Decree that provides for "averaging across multiple lines." However, plaintiffs contended that the July 15, 1998 Order was in error on the grounds that: (1) any mention of the possible application of a *de minimis* standard is premature; (2) the Consent Decree requires the MTA to utilize a "sliding window" rather than the MTA's "fixed" 20-minute periods; (3) the Consent Decree's "by-pass" provision does not require a finding that the MTA "intentionally" by-passes passengers; (4) the July 15 Order improperly limited potential remedies to a line-by-line approach; and (5) that the stipulated facts require a finding that the MTA has breached the Decree by failing to procure an additional 102 buses. The plaintiffs also moved to strike, as improper extrinsic evidence, MTA's declarations submitted in support of its earlier briefs on the compliance issue.

In response, the MTA filed its opposition brief on August 21, 1998, contending that the Special Master's July 15 Order is legally supportable, and that plaintiffs have not made the requisite showing for reconsideration under U.S. Central District Local Rule 7.16. The MTA also moved to strike the declaration of Thomas Rubin as extrinsic evidence. On August 24, plaintiffs filed a reply in support of their petition for reconsideration.

Upon consideration of the parties' opening briefs and the plaintiffs' reply brief, as well as the evidence in the record, I make the following findings and conclusions of law, granting in part, and denying in part, plaintiffs' motion for reconsideration:

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

FINDINGS AND CONCLUSIONS

1. Where, as here, a ruling is non-final, a court has discretion to reconsider its prior decision. *See Pyramid Lake Paiute Tribe of Indians v. Hodel,* 882 F.2d 364, 369 n.5 (9th Cir. 1989). Moreover, under Section V.B. of the Consent Decree, the Special Master may establish appropriate procedures. Although I am concerned about the additional delay in addressing the issue of MTA's compliance with the load factor targets, I have reviewed the petition for reconsideration and MTA's response and have decided to make certain modifications and clarifications to my prior Order, primarily to simplify and expedite resolution of the compliance phase of this proceeding and to move on, if necessary, to the remedy phase.

2. The fundamental holding of the July 15 Order is hereby reaffirmed. Section II.A.1. of the Consent Decree requires MTA to meet the December 31, 1997 load factor reduction target for all nonexempt bus routes, measured on a line-by-line basis. Where there is sufficient and timely monitoring data which show that the target has been exceeded on a specific line, other than on an exempt line, then the MTA is not in compliance with respect to that line. Since the Consent Decree requires MTA to meet the load factor target for all nonexempt bus lines, the failure to meet the target on any specific nonexempt line constitutes noncompliance with a requirement of the Decree.

3. The legal findings in the July 15, 1998 Order were intended to deal solely with the threshold legal standard by which *compliance* is to be measured; they did not purport to

resolve any remedial issues. The references to the potential application of a *de minimis* standard (a power which the parties do not dispute is available to the Court) were intended to initiate discussions by the JWG and to obtain its expert advice for purposes of possible application to a future remedial determination, if necessary and appropriate, at a later stage and after full legal briefings and evidentiary findings. Plaintiffs have expressed great concern that the July 15 Order may have anticipated remedial issues collateral to the question of compliance -- issues which the parties have not yet briefed. Since there will be ample opportunity to address and brief fully this issue, if necessary, at a subsequent remedial stage of this proceeding, I am hereby deleting all references and directives in the July 15 Order relating to the *de minimis* standard.

4. Contrary to plaintiffs' contention (see Pls. Recon. Br., pp. 4-6), the July 15 Order did not limit the type of relief that may be appropriate if a finding of noncompliance is made. The Consent Decree requires that *compliance* be measured on a line-by-line basis, not that any *remedy* be solely limited to a line-specific remedy. The appropriate forms of remedy will be the subject of subsequent proceedings, if necessary.

5. Section II.A.2 of the Consent Decree is silent on how the "20-minute peak period" is to be specifically computed. In the July 15 Order, the Special Master concluded that the "20-minute peak period" referenced in the Decree should be calculated using the fixed 20-minute periods utilized by the MTA. This finding was based primarily upon Section ILA..2., which provides that: "MTA shall conduct ride checks to determine load factors using current MTA procedures and

schedules." Upon further reflection and analysis of this provision, however, it appears that this provision does not fully resolve the ambiguity in this section. The participial phrase "using current MTA procedures and schedules" grammatically refers to and modifies the predicate "shall conduct ride checks"; it does not grammatically modify the infinitive phrase "to determine load factors." This distinction is significant because the task of actually "conducting" the ride checks (or point checks) -- the act of counting the number of standing passengers at the specific time that a bus reaches a bus stop -- does not involve any application of or reference to a 20-minute period. Thus, this provision relating to the procedures used in *gathering* the data is not necessarily relevant to the question of how the raw data are analyzed for purposes of computing the load factors.

The controlling provision to be interpreted simply states:

> "'Peak load factor' shall mean (total number of passengers/total number of seats) which shall be determined by computing the highest ratio of total number of passengers to total number of seats achieved during any 20 ***minute weekday peak period*** in the peak direction of travel on each bus line."

Consent Decree, Section II.A.2 (emphasis added). Since there is no definition of "any 20-minute weekday peak period" in the Decree, I have looked to the sparse case law for precedent that may be helpful in resolving this ambiguity. In *Young v. Kwock*, 474 P.2d 285 (Haw. 1970), plaintiffs elected to rescind a securities sale under Hawaii's Blue Sky Law. One of the

defendants attempted to assert a statutory exemption for: "Any transaction pursuant to an offer directed by the offeror to not more than twenty-five persons . . . during *any period of twelve consecutive months* . . . ." *Id.* at 287 (emphasis added). This defendant argued that "any period of twelve consecutive months" referred to a fiscal year. The Hawaii Supreme Court rejected this argument, holding that the language referred without limitation to "any period" of twelve months. *Id.* Thus, the Court implicitly acknowledged the use of a sliding window as the plain and unambiguous interpretation of the term.[1]

Ultimately, even if both interpretations of the term "any 20-minute period" are regarded as equally plausible, the "sliding window" appears to be more consistent with the purpose of the Decree. The Special Master has repeatedly emphasized that one of the central purposes of the Decree is to improve service and reduce overcrowding for the transit-dependent of Los Angeles. *See also* Consent Decree, Section 1. The "sliding window" approach differs from the fixed periods method by the significant fact that, under the former approach, more load factors are computed for each bus route. Since it is likely that a greater sample size would increase the accuracy of the prediction, the "sliding window" method provides a more accurate assessment of the overcrowding conditions in the bus

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[1] This conclusion is consistent with the Ninth Circuit holding in *Reconstruction Finance Corp. v. Chromium Products Corp.*, 202 F.2d 664, 666 (9th Cir. 1953) that the term "any restriction" is not confined to a "single kind" of restriction.

routes being measured.[2]

Moreover, under Cal. Civ. Proc. Code § 1864, "when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made." *See also Sutherland v. Barclays Am./Mortgage Corp.*, 53 Cal. App. 4th 299, 61 Cal. Rptr. 2d 614 (1997)(where parties' competing interpretations of stop provision were equally plausible, agreement was interpreted in favor of borrower in whose favor agreement was made). Clearly, the persons in whose favor the Decree was made -- the transit-dependent of Los Angeles -- are most favored by an interpretation which measures compliance by a more comprehensive standard of measurement.

Accordingly, the Special Master grants plaintiffs' motion on this issue and hereby adopts the 20-minute "sliding window" approach as the governing interpretation of "peak load factor" for the purpose of computing compliance under Section II.A.2

6. The July 15 Order stated that Section II.A.2. "prohibits MTA from *intentionally* by-passing passengers as a means of achieving compliance with the load factor targets." July 15 Order, p.11 (emphasis added). Plaintiffs correctly point out that Section II.A.2. of the Decree makes no reference to the

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[2] Indeed, one of the MTA's representatives to the JWG has candidly admitted that "ideally it should be a sliding 20-minute window." *See* Reporter's Transcript of [JWG] Proceedings, May 27, 1997, 63:4-5.

intent of the MTA in stating that "[t]arget load factors shall not be achieved by by-passing passengers at bus stops."

Nonetheless, the Decree does not explicitly require the MTA to keep data on by-passed passengers. If the plaintiffs wish to present data showing that passengers are being by-passed (whether intentionally or not), and that such data, if included in the computations, would have the effect of showing noncompliance with the load factor targets for certain bus lines, such data will be considered in subsequent proceedings on noncompliance. However, the possibility that plaintiffs may introduce such evidence in the future will not be cause for delay in the present proceedings.[3]

7. Extrinsic evidence supporting an interpretation to which an agreement is not reasonably susceptible is not admissible. *Barris Indus., Inc. v. Worldvision Enters., Inc.*, 875 F.2d 1446 (9th Cir. 1989). The declarations of Dana Woodbury and Harold Hirsch, submitted by the MTA on July 8, 1998, constitute such inadmissible extrinsic evidence because they support MTA's unreasonable interpretation that the Consent Decree requires compliance based on an averaging across all bus routes. Contrary to plaintiffs' contentions, I did not rely on such evidence in providing a threshold legal interpretation of the compliance issue, but suggested that this type of evidence could be considered in a remedial phase of this proceeding. I

---

[3]If evidence is subsequently presented on this issue, and if the Special Master makes findings of noncompliance based thereon, any remedies can be considered at that time.

am therefore granting plaintiffs' motion to strike this evidence from the record at this time, without prejudice to MTA's right to introduce this evidence at a subsequent remedial stage, if necessary. Consequently, the August 14, 1998 Declaration of Thomas Rubin is also stricken (subject to the same right to re-introduce) because such evidence was submitted by the plaintiffs solely to rebut the extrinsic evidence of Woodbury and Hirsch.

8. Without additional factual information, the Special Master is not prepared at this time to issue a finding of compliance or noncompliance on the issue of the 102 buses. The Special Master's March 12, 1997 Preliminary Views did not establish any specific deadline for the purchase of the buses. As stated in the July 15 Order, this issue will be addressed in conjunction with a subsequent remedial stage, if necessary, or upon the development of an appropriate factual record.

IT IS HEREBY ORDERED THAT:

1. All references and directives in the July 15 Order relating to the *de minimis* standard are hereby STRICKEN. The issue will be fully briefed at a subsequent stage of this proceeding, if necessary.

2. Plaintiffs' motion for reconsideration on the issue of the "sliding window" is hereby GRANTED. The Special Master hereby adopts the 20-minute "sliding window" approach as the governing interpretation of "peak load factor" for the purpose of determining compliance under Section II.A.2.

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

3. Plaintiffs' motion on the issue of the by-passed passengers is GRANTED, in part, and DENIED, in part. The MTA is not required to keep data on by-passed passengers. However, the plaintiffs can introduce evidence that passengers are being bypassed (and that such data affect load factor computations) whether such conduct is intentional or not.

4. Plaintiffs' motion to strike the declarations of Dana Woodbury and Harold Hirsch is hereby GRANTED; MTA's motion to strike the declaration of Thomas Rubin is also GRANTED. Both parties shall have the right to reintroduce such evidence at a subsequent remedial stage, if necessary.

5. Plaintiffs' motion on the issue of the 102 buses is DENIED. The issue will be considered further at a later date upon the development of an appropriate factual record.

6. The Joint Working Group shall meet as soon as possible to review the load factor monitoring data and report its findings to the Special Master as to whether or not the MTA is in compliance with the 1.35 load factor reduction target set forth in Section II.A.1. of the Consent Decree, as interpreted in the Special Master's Order of July 15, as modified by this Order of August 25, 1998. The JWG shall report its findings to the Special Master by facsimile on the form attached at Exhibit A on or before September 4, 1998, unless an extension is granted upon specific request to the Special Master.

IT IS SO ORDERED

Dated: August 25, 1998

/s/ Donald T. Bliss
Donald T. Bliss
SPECIAL MASTER

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

EXHIBIT A

The Joint Working Group met on _____, 1998 from _____ to _____ . The members of the JWG have reviewed the Memorandum Decision and Order of the Special Master, dated July 15, 1998, and the modifications to that Order dated August 25, 1998. Based on the review and advice of the JWG, as Co-Chair of the JWG, we have made the following findings, as evidenced by our initials below.

_____ We have determined that MTA has met the load factor reduction target of 1.35 set forth in Section II.A.1. of the Consent Decree.

_____ We have determined that MTA has not met the load factor reduction target of 1.35 set forth in Section II.A. of the Consent Decree with respect to certain bus lines.

_____ We cannot agree as to whether MTA has met the load factor reduction target of 1.35. We therefore have reached impasse.

_____ MTA has not met the load factor targets on the following nonexempt bus lines (bus lines which did not meet the load factor targets but met the *de minimis* standard are to be included but may be identified separately): _____

_____

_____

_____

_____

_____.

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

_____ In determining that the target exceedence for certain bus lines is *de minimis* for purposes of remedy, we have adopted the following *de minimis* standard: _____

_____

_____.

_____ We did not agree on a *de minimis* standard. We have attached hereto *de minimis* standards recommended by each of the Co-Chairs and a list of bus lines that would qualify as *de minimis* under each respective standard.

_____ _____

Co-Chair Co-Chair

for _____ for _____

_____DATE/TIME

August 25, 1998 Order of Special Master Re Plaintiffs' Motion for Reconsideration of July 15, 1998 Order

PROOF OF SERVICE

The foregoing ORDER RE PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE SPECIAL MASTER'S JULY 15, 1998 ORDER RE COMPLIANCE STANDARDS IN RE LOAD FACTOR COMPLIANCE has been served on August 25, 1998, via the United States Postal Service by first-class, pre-paid mail in sealed envelopes to the following parties:

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Copies of the foregoing have been provided by facsimile to Mr. Kenneth Klein/Mr. Steven Carnevale, Mr. Richard Larson and Ms. Constance Rice.

/s/ Donald T. Bliss
Special Master

July 9, 1998 MTA Brief re Load Factor Compliance

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
STAGE II PROCEEDING BEFORE SPECIAL MASTER
DONALD T. BLISS, JR

Labor/Community Strategy Center, et al.,	)	Case No. CV
	)	94-5936 TJH
Plaintiffs,	)	(MCx)
	)	
v.	)	**In re Load**
	)	**Factor**
Los Angeles County Metropolitan	)	**Compliance**
Transportation Authority, *et al*,	)	
	)	**The MTA's**
Defendants.	)	**Brief re**
	)	**Load Factor**
	)	**Compliance**
	)	**Standard**

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I. INTRODUCTION

The primary task for the Special Master is to devise a standard by which to determine whether the MTA has complied with the target load factor requirements of the Consent Decree. Plaintiffs argue for an "all or nothing" standard that would find the MTA in violation of the Consent Decree if it failed to meet the 1.35 requirement for any bus route during any 20 minute monitoring period. As discussed below, that standard would, in effect, force the MTA to achieve a load factor well below the required 1.35 target on most routes on most days.

The MTA, on the other hand, contends that a reasonable standard must take into account the fact that service interruptions will occur and when they do, the 1.35 target will be missed. The MTA commissioned Harold Hirsch, an esteemed transit expert who recently retired after 23 years as the head of planning for the Chicago Transit System, to consult with Dana Woodbury, who for the past 16 years has been employed by the Southern California Rapid Transit District and then the MIA, to devise a standard that is both consistent with the goals of the Consent Decree as well as with the norms of the transit industry.

That standard is set forth in this brief. While it recognizes that service interruptions are a fact of life in the transit industry, it requires that the MTA perform in a manner consistent with the industry norm. It also complies with the request of the FTA's Regional Administrator that the parties establish a "clearer, more definitive criteria for measuring compliance . . . ." See, Declaration of Dana Woodbury ("Woodbury Decl."), Exhibit "A." In short, it provides a fair standard that can and should be acceptable to all parties.

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II. THE STANDARD BY WHICH TO MEASURE COMPLIANCE WITH THE TARGET LOAD FACTOR IS BY COMPARING THE MTA'S PERFORMANCE WITH AN ESTABLISHED "BENCHMARK" IN THE INDUSTRY.

The Consent Decree states:

> 1. Improved Performance Goal: Reduced Load Factor Targets: MTA's performance in meeting this critical objective of responding to consumer demand for bus services efficiently shall be measured by the reduction in levels of crowding on board buses. MTA shall establish as a five-year goal to be reached by the end of the fifth complete fiscal year following the approval of this consent Decree, the reduction of the maximum load factor ceiling for all bus routes from 1.45 to 1.2 in the following increments ("target load factors"):
>
> December 31, 1997, 1.35
> June 30, 2000, 1.25
> June 30, 2002, 1.2
>
> Thereafter, MTA shall maintain the 1.2 load factor for the duration of this Consent Decree.
>
> 2. Load Factor Definition. "Peak load factor" shall mean (total number of passengers/total number of seats) which shall be determined by computing the highest ratio of total number of passengers to total number of seats achieved during any 20 minute weekday peak period in the peak direction of travel on each bus line. This load factor computation would be based on a one hour time interval during non-peak periods. Target load

> factors shall not be achieved by by-passing passengers at bus stops. MTA shall conduct ride checks to determine load factors using current MTA procedures and schedules. MTA shall supply the JWG with all such data, including on-board surveys, ride and point checks and passenger surveys, throughout the year, and inform the JWG of any change in data gathering/processing procedures. The JWG may request that MTA collect additional data as appropriate to monitor compliance with the load factor targets. (emphasis added).

Despite best efforts by the MTA to schedule and operate adequate service for the purpose of sustaining average passenger loads below the 1.35 target, it is inevitable in the transit industry that some portion of service will be lost due to service interruptions. *See,* Declaration of Harold R. Hirsch ("Hirsch Decl."), ¶ 7; Woodbury Decl., ¶ 3. Service interruptions occur for a variety of reasons that are beyond the MTA's -- or any operator's -- control and include, but are not limited to: (a) equipment breakdowns, (b) accidents, (c) excessive traffic, (d) passenger illness, (e) prolonged train crossings, (f) missed pullouts, and (g) problems with schedule adherence. *Id.*

The issue is what is an acceptable level of service interruptions. *Id.* The best way to arrive at this determination is to evaluate the extent of service interruptions experienced by the MTA and compare that to the industry norm. *Id.* Such a procedure ensures that the standard will not be skewed due to the age and/or the condition of the MTA fleet. *Id.*

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A. No Operator Can Replace Lost Service Within 20 Minutes.

A service interruption in a 20 minute peak period, whether the result of a breakdown of a bus or some other cause, has a direct impact on the load factor for that 20 minute time period because in most instances, neither the MTA nor any other large operator can replace service within a 20 minute time frame. Hirsch Decl., ¶ 8; Woodbury Decl., ¶ 9. This is true because it is often impossible to reach the location where the interruption occurred, and then replace/repair the equipment and/or solve the problem, and deliver service in less than 20 minutes. *Id.* In fact, even if replacement buses were available at various locations, during peak periods, it still will take more than 20 minutes to get a replacement bus into the rotation. *Id.* By then, the damage is done in terms of maintaining the desired load factor. *Id*

An analysis was performed to determine the amount of time it would take to respond to a service interruption fast enough to avoid the loss of service capacity that would otherwise occur. *See*, Woodbury Decl., ¶¶ 6-7, Exhibit "B." Two alternatives were considered: (1) dispatching a replacement bus from the operating facility serving the impacted bus line; and (2) staging equipment and manpower at the midpoint of bus lines. *Id.* In all cases, response time was calculated as the time needed to replace the disabled bus at the point of the service interruption added to the time it then took for the replacement bus to move to the point where an observer monitors the service for purposes of determining compliance with the load factor target. *Id.*

During peak travel periods, the analysis determined that replacing service from the operating facility could never be

accomplished within a 20-minute interval. Woodbury Decl., ¶¶ 8-9. Even with staged equipment, the analysis determined that the response time would exceed 20 minutes about 86% of the time. *Id.* In short, by utilizing replacement buses the MTA cannot eliminate exceedence of the target load factor ceiling caused by service interruptions during peak travel periods on the 77 bus lines being monitored. *Id.*, Kirsch Decl., ¶ 9.

B. Scheduling Additional Service Imposes An Unreasonable Expense And Burden On The MTA.

Next, the alternative of scheduling additional service was evaluated. Woodbury Decl., ¶ 10, Exhibit "C." Based on this analysis, it was found that providing one additional bus trip in the peak direction of travel during each 20 minute period as protection against the loss of a trip from a service interruption was prohibitively expensive. *Id.* In order to provide such protection, each of the 77 bus lines being monitored for load factor compliance must have an additional trip scheduled in each of the nine 20-minute intervals spanning over a peak travel period, *i.e.*, from 6-00 a.m. to 9:00 a.m. and from 3:00 p.m. to 6:00 p.m. *Id.* This level of protection would increase the MTA'S peak service bus requirements by 33%, from 1,786 buses to 2,371 buses, Id. This level of protection is unreasonable and excessive and would force the MTA to, in effect, achieve a target load factor that, for the overwhelming majority of the time periods, is far below the 1.35 that is required by the Consent Decree. *Id*; Hirsch Decl., ¶ 10.

C. A Peer Benchmark Is The Most Appropriate And Reasonable Standard To Measure The MTA's Compliance With The Target Load Factor.

Plaintiffs will surely argue that the reason the cost of utilizing replacement buses and/or scheduling additional

service to counter the effects of service interruptions is prohibitive because the MTA's fleet suffers many more breakdowns than comparable transit operators. Since service interruptions that result in a loss of service are a statistic that is annually reported under the Federal Transit Administration's National Transit Database (formerly Section 15) program, a telephone survey was conducted of the 14 largest bus transit operators in the United States other than the MTA to determine the frequency of service interruptions.[1] Woodbury Decl., ¶ 11, Exhibit "D." Data for fiscal 15 year ("FY") 1997 was obtained from the 12 operators who responded. Each of the responding operators provided their reported number of service interruptions and annual total vehicle miles operated. *Id.*

Based on this information, the frequency of service interruptions was calculated as the ratio of total miles operated per incident of service interruption. Woodbury Decl., ¶¶ 11-12, Exhibit "E." To establish a reasonable expectation for operator performance, a weighted average mileage between service interruption incidents was calculated. *Id.* Each operator's reported total mileage was used as the weighting factor because incidents occur as a function of the quantity of service operated--if your buses travel 1,000 miles each day then they will have more frequent breakdowns than if they travel only 500 miles each day. *Id.* The results of this analysis were as

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[1]Of those operators surveyed, Boston and Minneapolis, had numbers that contained data irregularities and Philadelphia and Pittsburgh did not respond. Due to the limited time available to determine why their numbers were so different and to convert them so that they would provide meaningful data, Boston and Minneapolis were dropped from the survey. Woodbury Decl., ¶ 11.

follows:

- The Average Miles Between Incidents for the Twelve Operators: 2,040.
- Mileage Between Incidents for the 12 Operators: 1,305 (lowest) - 3,719 (highest).
- Mileage Between Incidents for the MTA: 1,667.

When arranged in order from highest to lowest mileage between incidents, the MTA was found to rank in the middle of the lower half of the operators surveyed. *Id.*

D. The MTA's Past Performance.

Using the above weighted average frequency of service interruptions for the peer operators--and accepting the proposition that it is unrealistic to expect the MTA to replace a bus within the 20 minute monitoring period or to schedule 33% more buses than are required--the proportion of time periods the MTA would be expected to miss the load factor target is set forth below in this chart:

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		Time Period Exceeding Load Factor Target			
Day of Week	**Time Period**	**Peer Bench-mark**	**Actual MTA Q4 1997**	**Actual MTA Q1 1998**	**Actual MTA Q2 1998**
	AM Peak	3.14%	4.79%	3.83%	3.33%
	Midday	2.67%	0.38%	0.21%	0.08%
Weekday	PM Peak	2.77%	5.79%	4.11%	3.20%
	Early Eve.	3.32%	3.95%	3.46%	1.52%
	Overall	**2.90%**	**3.95%**	**2.99%**	**2.39%**
Saturday	**Overall**	**2.82%**	**2.95%**	**1.53%**	**1.25%**
Sun./Hol.	**Overall**	**2.40%**	**1.24%**	**0.38%**	**1.40%**

Note: Q2 1998 data through June 20, 1998 (12 weeks)

The survey tells us that using the industry norm, we would expect to see service interruptions in 2.90% of the time periods monitored. Woodbury Decl., ¶ 12. Because on average the number of buses monitored on each route during the peak 20 minute period is three, service interruptions--by eliminating one-third of the service for the 20 minute monitoring period--almost always will cause a failure to meet the 1.35 target. *Id.* Thus, one service interruption will cause the load target to be exceeded in the time period when the service interruption occurred.

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Therefore, if the industry norm is that we should expect service interruptions in 2.90% of the time periods monitored, then we must also expect that pursuant to the industry norm the target load factor will be exceeded in 2.90% of the time periods monitored. Woodbury Decl., ¶ 12; Hirsch Decl., ¶ 11.

The "overall" calculation establishes that the MTA's performance systemwide during the second quarter of 1998 was better than the industry benchmark (2.39% vs. 2.90%). When broken down by peak daily time periods, the MTA's second quarter 1998 performance is slightly above the peer benchmark (3.33% vs. 3.14% for AM peak and 3.20% vs. 2.77% for PM peak). Woodbury Decl., ¶ 12; Hirsch Decl., ¶ 11.

E. Evaluating the MTA's Performance

Until now, no objective standard existed by which the MTA--or anyone else--could determine whether the MTA's performance was consistent with the load factor requirements of the Consent Decree. The MTA contends that by obtaining a load factor of 1.35 or less in more than 97% of the periods monitored and by meeting the objective standard on a systemwide basis that it had complied with the Consent Decree. The plaintiffs, on the other hand, argue that failure by the MTA to achieve the target load factor in any single monitored time period was a violation of the Consent Decree.

Adoption of the criteria set forth herein would provide an objective standard to determine whether the MTA is in compliance with the Consent Decree. It would eliminate the situation that has existed up until now, which provided no objective way in which to determine whether in fact the MTA was in compliance with the Consent Decree.

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Under the vague standard existing in the Consent Decree, the MTA -- by meeting the target in more than 97% of the periods monitored -- has been in compliance with the load factor target requirements up to this point in time. If the Special Master adopts the criteria set forth herein, the MTA should be given a reasonable period of time to come into conformance with this newly proclaimed objective standard. In determining what is a reasonable period for the MTA to come into compliance with this newly proclaimed objective standard.

In determining what is a reasonable period for the MTA to come into compliance with this newly proclaimed objective standard, the Special Master must take into account certain unforeseen circumstances that -- through no fault of the MTA -- will severely hamper its ability to meet the target with respect to peak AM and PM weekday time periods in less than six months (the MTA already meets the new criteria on a systemwide basis). Specifically, the MTA has approximately 200 currently inoperable ethanol buses in its fleet as well as approximately 500 CNG buses that, while operable, are experiencing various problems that severely reduce their reliability.

Due to failures on the part of the manufacturer, the 500 CNG buses have experienced substantial problems involving fuel regulators, exhaust system failure, electronic control module failures and inability to achieve the driving range that the manufacturer had claimed they would achieve. All of these problems have been acknowledged by the manufacturer to exist and to be the fault of the manufacturer. The manufacturer is currently working together with MTA to fix each of these problems, and it is hoped that these problems will be resolved by the end of the year. Declaration of Richard Hunt ("Hunt Decl."), ¶ 4.

July 9, 1998 MTA Brief re Load Factor Compliance

Additionally, the MTA is in the process of re-powering approximately 200 inoperable ethanol buses currently in its fleet and converting them to diesel. See Declaration of Habib Balian ("Balian Decl."), ¶ 4. These 200 buses are currently not in service because their engines failed and it was not economically feasible to replace them with a similar engine. This action will add approximately 20 buses per month until completed. Moreover, the MTA is currently negotiating with the vendor performing the engine conversion to accelerate the process. As these buses are returned to active service, they will replace the oldest and least reliable buses currently in service. This will significantly improve the MTA's fleet reliability and its ability to meet the target load factor. Once again, it should be emphasized that the fact that these 200 ethanol buses are inoperable is not in any way the fault of the MTA. Hunt Decl., ¶¶ 3-5.

In short, because through no fault of the MTA, it has approximately 700 buses that are either inoperable or are experiencing service interruptions far beyond what is normal in the industry, the MTA requests that the Special Master take such unforeseen circumstances into consideration and allow the MTA six months to meet the new objective standard with respect to peak AM and PM weekday time periods, which will provide the manufacturers adequate time to rectify their mistakes. (Due to the shortage of time, it has not been possible for the MTA to provide a detailed analysis to show precisely what improvements can be expected once the problems with the 700 buses have been rectified. Should the Special Master desire such an analysis, the MTA would be happy to provide it.)

F. The Criteria Adopted by the Special Master Should Not be Based on an Analysis of Individual Bus Lines.

The standard proposed by the MTA analyzes time periods, such as AM peak, PM peak, etc., rather than individual bus lines. Woodbury Decl., ¶ 13; Hirsch Decl., ¶ 12. The reason a time period analysis is more desirable than a line-by-line analysis is that the former provides results that are much more reliable. *Id.* For example, an accident or some other unexpected event can severely affect the ability of any individual line to meet the target load factor on a given day. *Id.* Experience shows that an accident can affect not one but a number of monitoring periods and can cause a particular line to far exceed the 1.35 target. *Id.* On the other hand, by looking at various time periods, we can obtain a much more accurate understanding of whether the MTA is in fact in compliance with the 1.35 target load factor. *Id.*

III. THE CURRENT PLANS TO ADD BUSES AND MAKE CHANGES IN OPERATIONS AND MAINTENANCE WILL SIGNIFICANTLY IMPROVE THE MTA'S OVERALL PERFORMANCE AND TARGET LOAD FACTOR.

Recently, the MTA made a number of changes in the Operations Department to address issues and concerns in the areas of management and operations. Since June 8, 1998, the MTA appointed Jim Reichert as the Interim Executive Officer - Operations at the MTA. Mr. Reichert has promptly taken actions to address and improve problems with the maintenance program, on street supervision, training of operators, and accountability within the 11 divisions. *See,* Declaration of Jim

Reichert ("Reichert Decl."), ¶ 3. First, two maintenance superintendents have been added at each division to work day and might shifts. The direct effect of this addition is to increase the number of repairs that occur overnight. *Id.* This will result in more equipment availability and accessibility as the morning peak periods begin and thus reduce the number of service interruptions throughout the day caused by equipment failure. *Id.* As previously shown, the reduction of service interruptions is directly linked to the target load factor. The need for this change arises from the previous lack of adequate supervision in the evening hours when most repairs and maintenance of equipment take place. *Id.*

In addition to the above changes, the MTA has taken steps to hire additional clerical personnel and an assistant transportation manager at each division. Reichert Decl., ¶ 4. By adding this support, transit supervisors will have the time needed to conduct more on-street supervision and training of operators. *Id.* In the past, transit supervisors were performing clerical work in addition to their supervisory duties, and were not spending enough time out in the field to properly supervise and oversee the operation of the system, including operators running ahead of schedule. *Id.* Running "hot" or ahead of schedule, has the effect of increasing the gap between buses and thus increases passenger loads for later buses. *Id.* Accordingly, by increasing the time supervisors spend on the street, the number of drivers running "hot" or ahead of schedule will be reduced and there will be a more even distribution of passengers on each bus. *Id.* Another result from this action is that service interruptions will be reduced to the extent that the transit supervisor is available to reach the location of the service interruption and assist in replacing service. Additional

training will improve the assignment of bus drivers and reduce service interruptions caused by driver unavailability. *Id.*

The changes and actions taken thus far are standard procedures that are utilized in the industry and will result in improved systems operations. Reichert Decl., ¶ 5, Hirsch Decl., ¶ 13. They will have the cumulative effect of improving service delivery and hence will reduce even further the target load factor within the next few months.

IV. THE MTA MAY DETERMINE THE LOAD FACTOR WITHOUT DATA ON "BY-PASSED" PASSENGERS.

A. The Consent Decree Permits The MTA To Use its Own Procedures To Determine The Load Factor.

The Consent Decree provides that the "MTA shall conduct ride checks to determine load factors *using current MTA procedures and schedules.*" The MTA's procedures and schedules which have been in effect for at least 10 years, do not include gathering data on "by-passed" passengers. Woodbury Decl., ¶ 14. Thus, the fact that the MTA does not gather data on "by-passed" passengers 2 is not a violation of the Consent Decree.

B. There Is No Allegation Or Demonstration That The MTA Is Bypassing Passengers.

The Consent Decree states that MTA may not intentionally "by-pass" passengers at bus stops in an effort to meet the target load factor. Simply using data that does not account for by-passed passengers is not synonymous with intentionally by-passing passengers and is not a violation of the Consent Decree.

C. There Is No Proper Method To Collect Data On By-Passed Passengers.

Plaintiffs' contention that the MTA violates the Consent Decree by calculating the load factor without data on by-passed passengers ignores the fact that there are serious problems associated with gathering data on by-passed passengers. Woodbury Decl., ¶ 14; Hirsch Decl., ¶ 14. One of the primary problems occurs because a passenger is counted when that passenger is by-passed, and counted once again when the passenger boards a bus. *Id.* This leads to double counting of passengers. *Id.*

Another problem is determining who is a "by-passed" passenger. *Id.* Unless individual interviews are conducted at each bus stop, it is impossible to determine who is waiting for which bus at bus stops served by multiple bus lines. *Id.* It is also impossible to determine who among the people standing in the vicinity of a bus stop is waiting for the bus in order to ride it, as opposed to those who are there to meet someone arriving by bus. *Id.* Similarly, it is difficult to determine whether a passenger is "by-passed" if two buses arrive within a few moments of each other, *i.e.*, both buses being within the sight of the observer at the same time, and the first bus does not stop, but the second bus does. *Id.* There is no method to properly account for this occurrence. *Id.* Finally, there is no procedure to determine whether a passenger should be considered "by-passed" in the event a dispatcher or road supervisor orders a bus to skip several stops to even the spacing between buses, or close a gap created by a missing trip. *Id.*

In essence, because there is no unambiguous means of determining who is a pass-by, nor with which bus they should be associated, to impose such a requirement on the MTA is not

only outside the scope of the Consent Decree, but inappropriate in light of the inaccuracies inherent in such data.

D. The Common Practice In The Industry Does Not Include Accumulating Data On By-passed Passengers in Determining the Load Factor

The standard in the industry is consistent with the MTA's practice. In a survey of twelve of the largest bus operators in the country, it was found that, like the MTA, seven do not account for by-passed passengers to determine the load factor, three do not account for by-passed passengers in any manner, and two did not respond. *See,* Woodbury Decl., ¶ 15. Based on these findings, it would be unreasonable to impose a duty on the MTA to account for by-passed passengers when that is clearly not the common practice for major bus operators in the U.S. *Id.*; Hirsch Decl., ¶ 14.

V. THE MTA MAY DETERMINE THE LOAD FACTOR BY ANALYZING/CATEGORIZING MONITORING DATA INTO FIXED MINUTE INTERVALS

A. The Consent Decree permits The MTA To Use Its Own Procedures To Determine The Load Factor.

The Consent Decree provides that the "MTA shall conduct ride checks to determine load factors using *current MTA procedures and schedules.*" The MTA's procedures and schedules in existence at the time of the negotiation of the Consent Decree--and for at least 10 years prior to the Consent Decree--used fixed 20 minute time intervals. Woodbury Decl., ¶ 16. MTA's procedures include two mechanisms for reporting/analyzing ride check or point check loading data. The

first is a periodic report (the Service Capacity/Utilization Report) prepared by the Operations Planning Department, following service changes; the second is an analytic tool ("Headway Sheets") used by the schedule makers whenever a check is conducted. *Id.* Each of these tools utilizes fixed 20-minute time periods (hourly time periods at off-peak times). *Id.*

While negotiating the Consent Decree, the plaintiffs had the opportunity to negotiate a change or alteration of the procedures and schedules used by the MTA to determine the load factor. They never even raised the issue.

Finally, the correct interpretation of the use of the word *any* in the referenced portion of the Consent Decree is with regard to any of the time periods monitored, not any 20-minute interval which is governed, pursuant to the words of the Consent Decree, by prior MTA practice.

B. The Common Practice In The Industry Uses Fixed Time Intervals In Determining the Load Factor, Not Sliding Intervals.

The standard in the industry is consistent with the MTA's procedures. In a survey of twelve of the largest bus operators in the country, it was found that, like the MTA, nine operators use fixed time intervals and only three use a floating or sliding window to determine the load factor. Woodbury Decl. ¶ 16. Based on these findings, it would be unreasonable to impose a duty on the MTA to analyze its data by using sliding time intervals versus fixed time intervals for load factor analysis when that is clearly not the common practice among operators in this country. *Id*; Hirsch Decl. ¶ 15.

VI. CONCLUSION.

For the reasons set forth above, the MTA requests that the approach presented be adopted to determine whether it has complied with the Consent Decree.

Dated: July 8, 1998

Respectfully submitted,

/s/ Kenneth Klein

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July 9, 1998 MTA Brief re Load Factor Compliance

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 300 South Grand Avenue, Los Angeles, California 90071-3109.

On July 8, 1998, I served the foregoing document(s) described as **The MTA's Brief re Load Factor Compliance Standard, Declarations of Dana Woodbury, Harold Hirsch, Habib Balian, James Reichert and Richard Hunt** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

July 9, 1998 MTA Brief re Load Factor Compliance

Executed on July 8, 1998, at Los Angeles, California.

_____

Jill D. Howell

(5)

Supreme Court, U.S.
FILED
MAR 1 2002
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No. 01-1054

In The

Supreme Court of the United States

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY; FRANKLIN E. WHITE, MTA Chief Executive Officer in his Individual and Official Capacities; JOSEPH NMI DREW, MTA Acting Chief Executive Officer in his Individual and Official Capacities,

vs.

Petitioners,

LABOR/COMMUNITY STRATEGY CENTER; BUS RIDERS UNION; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF GREATER LOS ANGELES COUNTY; KOREAN IMMIGRANT WORKERS ADVOCATES; MARIA GUARDADO; RICARDO ZELADA; NOEMI ZELADA; PEARL DANIELS; HENRY FREDERICK RAMEY, JR.; O. HOWARD WATTS; WILLIAM TUT HAYES; VICTOR DIBAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

Introduction. Respondents' opposition ignores the extensive evidence introduced in 1999 in the district court. Instead, they choose to rely on evidence produced in the district court in 1994 and on the Special Master's findings and conclusions based on declarations and arguments presented in 1998. The evidence before the Special Master was fragmentary, and it was seriously out of date when the matter was heard by the district court in 1999. In 1999, petitioners presented substantial uncontradicted evidence about the meaning of the technical term "load factor targets" and the intention of the parties in using that terminology in the settlement agreement. At the same time petitioners presented extensive evidence about the financial inability of the MTA to comply with the Special Master's "Order," while also complying with the federal and state statutory mandates.

I. THE LOWER COURTS DID NOT CONSTRUE THE CONSENT DECREE AS A CONTRACT

Respondents' contention that the lower courts construed the Consent Decree as a contract is not supported by the language used by the courts below nor by their conduct. In 1999, petitioners presented substantial uncontradicted evidence in the district court that the technical term "load factor targets" was intended to incorporate the meaning of the term as it is understood in the bus transportation industry. Contrary to the lower courts, a load factor target is not "a mathematically precise method of measuring bus overcrowding." (App. A at 14a.)

United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975) explained how consent decrees are to be interpreted:

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, *any technical meaning words used may have had to the parties*, and any other documents expressly incorporated in the decree. Such reliance does not in any way depart from the "four corners" rule of *Armour*. [Emphasis added.][1]

A standard principle of contract interpretation is that technical words in a contract are to be interpreted as usually understood by persons in the profession or business to which they relate, unless those words were truly used in a different sense. *E.g.*, Restatement (Second) of Contracts § 202(3)(b) (1981).[2]

Construing a consent decree as a contract requires ascertaining the intention of the parties. Despite petitioners' uncontradicted evidence about the meaning of the technical terminology and the parties' intent in using it in the Consent Decree, the district court made no finding on the point. The failure of the district court to

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[1] *United States v. Armour & Co.*, 402 U.S. 673, 91 S. Ct. 1752, 29 L. Ed. 2d 256 (1971).

[2] Accord Cal. Civ. Code § 1645: "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

make any finding on the intent issue supports the conclusion that the court did not construe the Consent Decree as contract, but rather as a judgment reached without the parties' consent. The court of appeals accepted the district court's conclusion.

II. THE LOWER COURTS' EXCESSIVELY INTRUSIVE ORDERS VIOLATE THIS COURT'S FEDERALISM PRINCIPLES

Respondents' arguments reveal their serious misunderstanding about the impact of federalism constraints imposed by this Court on lower federal courts. (R. Br. at 18-24.)

A deficiency, if any, in a state agency's plan to comply with the terms of a consent decree does not empower the federal courts to impose extremely intrusive mandatory injunctions on the agency. Even to remedy a proved constitutional violation, federal courts are required to respect the fiscal constraints and statutory duties imposed on state agencies. *E.g., Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

Respondents are simply wrong in arguing that the lower courts respected the MTA's funding limitations and its need to meet other statutory obligations. (R. Br. at 20.) Respondents again ignore the extensive evidence presented on those points to the district court. They rely instead on the Special Master's conclusions.

Respondents' argument that the Special Master's mandatory injunction gave the MTA an escape hatch is disingenuous. (R. Br. at 23-24.) All the Special Master said

was that a late arrival of mandated buses would not be deemed to violate his "Order" if the delay was due to circumstances beyond the MTA's control. Nothing in the Special Master's "Order" relieved the MTA of the obligations he imposed upon it to buy hundreds more buses than the MTA's own remediation plan specified. The MTA did not have the financial resources to operate the Special Master's expanded bus fleet.[3]

None of respondents' arguments justified the lower courts in disregarding the principles underlying cooperative federalism. None justified the federal courts in issuing mandatory injunctions that intrude deeply into the MTA's management of its public transportation systems. None justified the lower courts in disrupting the MTA's access to State and federal funding that is the lifeblood of the Agency.

The lower courts granted more intrusive injunctive relief against the MTA than a federal court is permitted to do in remedying a proved constitutional violation. Respondents' arguments ignore *Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976). Considerations of federalism required reversal of the district court's remedial order revising the internal operations of a state

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[3] Throughout their brief, respondents assume that the Special Master had the equitable powers of a federal court. He does not. They argue that the MTA was somehow estopped from arguing the point because years earlier a former MTA lawyer asked the Special Master for a temporary restraining order. The Special Master issued – but promptly rescinded – a TRO because he recognized that he was not empowered to issue it. Petitioners gained no benefit and respondents suffered no detriment from the lawyer's error. No estoppel existed.

or local agency in absence of extraordinary circumstances. No extraordinary circumstances exist here to justify the gross intrusion of the federal courts into the MTA's financing resources and its management of its extremely complicated public transportation systems in the guise of enforcing the Consent Decree. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992).

Unless certiorari is granted and the decision below is overturned, the MTA will be crippled thereby endangering its service to millions of users of its Los Angeles County transportation systems.

Dated: March 1, 2002

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No. 01-1054

IN THE
Supreme Court of the United States

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, *et al.*,

Petitioners,

v.

LABOR/COMMUNITY STRATEGY CENTER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

On February 19, 2002, following submission of Respondents' Brief in Opposition to Certiorari in this matter, a group of proposed *amici curiae*, including Foothill Transit and other public corporate bodies within Los Angeles County, filed a Motion seeking leave to file an appended Brief in support of Petitioners.[1] Although that Brief largely rehearses arguments made in the Petition, we believe that two points require a response.

First, *amici* identify their interest in this matter primarily as a concern about a hypothetical reallocation of revenues received by Petitioner MTA from sales taxes earmarked for public transportation ("Proposition A" and "Proposition C" funding):

> As part of its authority, MTA controls a substantial pool of these funds and disperses them to the *amici*.
>
> The Ninth Circuit ruling challenged here affirms a remedial order that will cost MTA many millions of dollars to implement. If MTA attempts to take Proposition A and C funds it otherwise would distribute to the *amici* to satisfy MTA's court-ordered obligations, less funding would be available to the *amici*.

(*Amici* Br. at 2) (footnote omitted.)

This interest is not implicated by the Questions sought to be presented by Petitioners. Neither the Special Master nor the District Court decided that the remedy for MTA's noncompliance with the Consent Decree should include

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[1]Although Respondents had consented to the filing of such a brief on behalf of Foothill Transit, proposed *amici* decided to submit a motion to this Court because "additional *amici* sought to join the proposed brief after that consent was given . . . [and] it was too late to obtain new consents from the parties" (Motion for Leave to File, at 1).

reallocation of Proposition A or C funds. Rather, the *Consent Decree* itself provides that:

> If MTA fails to meet the target load factors for all bus lines by the dates in paragraph 1 above, (except those exempted or deferred under paragraph 3 above), MTA shall meet the target as soon as possible and reallocate sufficient funds from other programs to meet the next lower target load factor as scheduled. The reprogrammed funds, *which may include but not be limited to revenues from Propositions A and C discretionary funds,* shall be used to meet the target load factors.

(Pet. 177a [emphasis added].) Thus, the possibility that Proposition A or C funds might have to be reallocated to meet MTA's responsibilities under the Decree is no different from the situation in *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), *rev'd on other grounds sub nom. Spallone v. United States*, 493 U.S. 265 (1990), in which, Petitioner's *amici* agree, federalism objections were not well-founded because the trial court's order "simply 'was carrying out the terms of the Consent Judgment,'" *Amici Br.* at 14 n.10.

It bears remarking that reallocation of "Propositions A and C discretionary funds" is a remedy congruent with the original act by MTA that gave rise to this lawsuit: "MTA's decision to spend several hundred million dollars [of discretionary funds] on a new rail line, foregoing an opportunity to reduce overcrowding problems on city buses, while at the same time increasing bus fares and eliminating monthly discount passes" (Pet. 3a [opinion below]).

Moreover, the Consent Decree (including the language quoted above) was entered in 1996 — yet *amici* have never sought to intervene in this action or otherwise protect the interests they now claim are threatened by its enforcement. In

any event, since MTA proposed the remedy of reallocating Proposition A and C funding in the Consent Decree itself, *amici*'s representation that the ruling below gives MTA "less protection from [*i.e.*, based upon] federalism principles than agencies found to have violated the law" (*Amici* Br. at 5) is sheer nonsense.

Second, even if we agreed — which we do not — with *amici*'s characterization of language in the ruling below, as approving a district court order that requires MTA to violate federal funding conditions that "might disqualify MTA from entitlement to receive funds" (Pet. 20a), this Court reviews judgments, not opinions. *E.g.*, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). And the judgment below affirms orders of the Special Master that explicitly allow MTA to meet federal program funding requirements even if that delays implementation of the remedy for its noncompliance with the Consent Decree. *See* Brief in Opposition to Certiorari, at 23-24.

In addition, as we pointed out in our Brief in Opposition to Certiorari (at 24-25), MTA informed the court below that it complied with the District Court's order in 1999 by purchasing 297 new buses. Not only was this accomplished, as we observed in the Brief in Opposition, without violating the terms of federal grant statutes, but we must presume that it was also accomplished without redirecting Proposition A or C funds away from *amici* — or they would surely have advised this Court otherwise.

CONCLUSION

Amici, like Petitioners, advance no meritorious reason for reviewing the judgment below. The Writ should be denied.

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